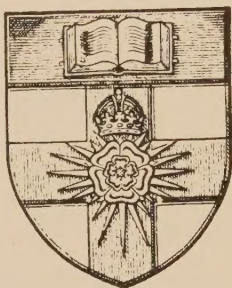


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THE
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AND
PEERAGE CASES.

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— — — s. 2. CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS v. ATTORNEY-GENERAL FOR CANADA J. C. 87

1933.

Local Government Act (23 & 24 Geo. 5, c. 43), s. 151, sub-s. 3; s. 152, sub-s. 1 (b); sch. 5, r. 1. NEWPORT BOROUGH COUNCIL v. MONMOUTHSHIRE COUNTY COUNCIL AND ANOTHER

H. L. (E.) 520

1934.

Law Reform (Miscellaneous Provisions) Act (24 & 25 Geo. 5, c. 41), s. 3 sub-s. 1. RICHES v. WESTMINSTER BANK, LD.

H. L. (E.) 390

Newport Extension Act (24 & 25 Geo. 5, c. 57), s. 58. NEWPORT BOROUGH COUNCIL v. MONMOUTHSHIRE COUNTY COUNCIL AND ANOTHER

H. L. (E.) 520

1935.

Government of Burma (26 Geo. 5, c. 3), ss. 84, 139, sub-s. 1, proviso. CHITTAMBARAM v. KING-EMPEROR

J. C. 200

1936.

Housing Act (26 Geo. 5 & 1 Edw. 8, c. 51), s. 2. MCCARRICK v. LIVERPOOL CORPORATION -

H. L. (E.) 219

1937.

Matrimonial Causes Act (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2. WEATHERLEY v. WEATHERLEY -

H. L. (E.) 628

1938.

Rating and Valuation (Postponement of Valuation) Act (1 & 2 Geo. 6, c. 19), s. 1. PRATT v. NORTH-WEST NORFOLK ASSESSMENT COMMITTEE AND OTHERS -

H. L. (E.) 635

1939.

Emergency Powers (Defence) Act (2 & 3 Geo. 6, c. 62), s. 11, sub-s. 3. WICKS v. DIRECTOR OF PUBLIC PROSECUTIONS - -

H. L. (E.) 362

BURMA.

1943.

Special Judges Act (Burma Act X. of 1943). CHITTAMBARAM v. KING-EMPEROR

J. C. 200

DOMINIONS.

CANADA.

1927.

Supreme Court Act, R. S. C. 1927, c. 35, s. 54. ATTORNEY-GENERAL FOR ONTARIO AND OTHERS v. ATTORNEY-GENERAL FOR CANADA AND ATTORNEY-GENERAL FOR QUEBEC

J. C. 127

War Measures, R. S. C. 1927, c. 206, ss. 3, 6. CO-OPERATIVE COMMITTEE ON JAPANESE CANADIANS v. ATTORNEY-GENERAL FOR CANADA

J. C. 87

1927-1940.

Income War Tax, R. S. C. 1927, c. 97 (as amended by s. 17 of c. 34, 4 Geo. 6, 1940), s. 6, sub-s. 2. MINISTER OF NATIONAL REVENUE v. WRIGHTS' CANADIAN ROPES, LD.

J. C. 109

1934.

Succession Duty, c. 55 (Ontario), s. 6, sub-s. 1. TREASURER OF ONTARIO v. BLONDE

J. C. 24

1935.

Patent Act S. C., c. 32, ss. 55, 57. FIBERGLAS CANADA, LD. AND ANOTHER v. SPUN ROCK WOOLS, LD. AND ANOTHER

J. C. 313

1938.

(Dominion) Transport Act, S. C., c. 53.
LUDDITT AND OTHERS *v.* GINGER
COOTE AIRWAYS, LD. **J. C. 233**

1939.

*Respecting Certain Vacant Property Without
an Owner (Geo. 6, c. 28) (Quebec),
s. 1. ATTORNEY-GENERAL FOR
CANADA v. ATTORNEY-GENERAL FOR
QUEBEC - - - - J. C. 33*

*Succession Duty (2nd Session), c. 1 (Ontario),
s. 5. TREASURER OF ONTARIO v.
BLONDE - - - - J. C. 24*

1940.

*Excess Profits, S. C. 1940, c. 32, s. 8 (b).
MINISTER OF NATIONAL REVENUE v.
WRIGHTS' CANADIAN ROPES, LD.
J. C. 109*

1945.

*National Emergency Transitional Powers,
1945, S. C., c. 25, ss. 2 (e), 4.
CO-OPERATIVE COMMITTEE ON
JAPANESE CANADIANS v. ATTORNEY-
GENERAL FOR CANADA J. C. 87*

1946.

*Alberta Bill of Rights Act, S. A. 1946, c. 11.
ATTORNEY-GENERAL FOR ALBERTA
v. ATTORNEY-GENERAL FOR CANADA
AND ANOTHER - J. C. 503*

INDIA.

1888.

*City of Bombay Municipal (Bom. Act III. of
1888), s. 222, sub-s. 1; s. 265.
PROVINCE OF BOMBAY v. MUNICIPAL
CORPORATION OF THE CITY OF
BOMBAY - - - - J. C. 58*

ORDINANCES JUDICIALLY CONSIDERED

BRITISH GUIANA.

1930.

*Carriage of Goods by Sea (Rev. St. of British
Guiana, 1930, c. 123), schedule rules,
art. III., rr. 3, 4. CANADA &
DOMINION SUGAR CO., LD. v.
CANADIAN NATIONAL (WEST INDIES)
STEAMSHIPS, LD. - - J. C. 46*

CEYLON.

*Housing and Town Improvement Ordinance
(Legislative Enactments of Ceylon,
c. 199), s. 19, sub-s. 1. MUNICIPAL
COUNCIL OF COLOMBO v. KUNA
MANA NAVANNA SUNA PANA
LETCHIMAN CHETTIAR J. C. 188*

*Land Acquisition (Legislative Enactments of
Ceylon, c. 203), s. 21 (a). MUNICIPAL
COUNCIL OF COLOMBO v. KUNA
MANA NAVANNA SUNA PANA LETCHI-
MAN CHETTIAR - J. C. 188*

PALESTINE.

*Ottoman Code of Civil Procedure, art. 112.
MUHAMMAD ISSA EL SHEIKH AHMAD
AND ANOTHER v. ALI AND OTHERS
J. C. 414*

1938.

*Land (Settlement of Title) Ordinance, c. 80.
BAHIYA LEVI v. AMIN NICOLAS
KHOURY AND OTHERS J. C. 494*

1939.

*Import, Export and Customs Powers
(Defence) Ordinance, No. 51, s. 3,
sub-s. 1; s. 5, sub-s. 1 (b). ATTORNEY-
GENERAL FOR PALESTINE v. FAKHRY
AYYAS - - - J. C. 332*

TRINIDAD AND TOBAGO.

1941.

*Land Acquisition Ordinance No. 14, s. 11,
sub-s. 2. POINTE GOURDE QUARRY-
ING AND TRANSPORT CO., LD. v.
SUB-INTENDENT OF CROWN LANDS
J. C. 565*

RULES AND ORDERS JUDICIALLY CONSIDERED

1922.

Palestine Order in Council, 1922, c. 46.
ELIEZER ZABROVSKY v. GENERAL
OFFICER COMMANDING PALESTINE
AND ANOTHER- - **J. C. 246**

*Emergency Regulations, 1936 (Palestine),
regs. 15, 15B. ELIEZER ZABROVSKY
v. GENERAL OFFICER COMMANDING
PALESTINE AND ANOTHER* **J. C. 246**

1938.

*Housing and Town Improvement (Legislative
Enactments of Ceylon, c. 199),
s. 19, sub-s. 1. MUNICIPAL COUNCIL
OF COLOMBO v. KUNA MANA
NAVANNA SUNA PANA LETCHIMAN
CHETTIAR - -* **J. C. 188**

*Palestine Land Settlement of Title (Procedure)
Rules, r. 13. BAHIYA LEVI v.
AMIN NICOLAS KHOURY AND
OTHERS - - -* **J. C. 494**

Palestine Civil Procedure Rules, 1938, r. 313.
BAHIYA LEVI v. AMIN NICOLAS
KHOURY AND OTHERS **J. C. 494**

1939.

*Defence (General) Regulations (St. R. & O.
No. 927), reg. 2A. WICKS v.
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*Defence Regulations, 1939 (Palestine), reg. 17G,
ELIEZER ZABROVSKY v. GENERAL
OFFICER COMMANDING PALESTINE
AND ANOTHER- -* **J. C. 246**

1945.

*Orders in Council of December 15, 1945
(P. C. 7355-7357) of Canada.*
CO-OPERATIVE COMMITTEE ON
JAPANESE CANADIANS v. ATTORNEY-
GENERAL FOR CANADA **J. C. 87**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)*

MERSEY DOCKS AND HARBOUR
BOARD.

APPELLANTS

1946

May 23, 24,
27, 28;
July 28.

AND

COGGINS & GRIFFITH (LIVERPOOL)
LIMITED AND ANOTHER

RESPONDENTS.

[Applied. GARRARD
by A. E. SOUTHEY &
CO.
[1952] 2 Q.B. 174]

Negligence—Transference of employment—Hiring of mobile crane and driver—Negligence of driver—Injury thereby caused to third person—Liability of regular employer or of hirer—Respondeat superior—Condition of hiring.

A harbour authority let a mobile crane to a firm of stevedores for loading a ship, providing a craneman who was employed and paid and liable to be dismissed by it, though the general hiring conditions stipulated that cranemen so provided should be the servants of the hirers. In the course of the operation he injured a third person by negligently driving the crane. At the time the stevedores had the immediate direction and control of the operation of picking up and moving each piece of cargo but had no power to direct how the crane should be worked or the controls manipu-

*Present: VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

A. C. 1947.

3 B

H. L. (E.)

1946

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lated. The injured person sued the harbour authority and the stevedores for damages :—

Held, that the harbour authority, as general permanent employer, was liable, not having discharged the heavy burden of proof so as to shift to the stevedores its prima facie responsibility for the negligence of the craneman, who in the manner of his driving was exercising the discretion it had vested in him. The question who was the employer responsible for his negligence was not determined by any agreement between the harbour authority and the stevedores.

Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd. [1893] 1 Q. B. 629, distinguished.

Although the plaintiff was indifferent which of the defendants might be held liable to him, he was a necessary party to the appeal of one of them to the House of Lords.

Decision of the Court of Appeal (sub nom. *McFarlane v. Coggins & Griffith (Liverpool), Ltd.* [1945] K. B. 301, affirmed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON and LORD MACMILLAN, were as follows: The appellant board owned a number of mobile cranes, each driven by a skilled workman engaged and paid by them, for the purpose of letting out the apparatus so driven to applicants who had undertaken to load or unload cargo at Liverpool Docks. This was a regular branch of their business. The conditions on which these cranes were supplied were printed and headed: "Regulations and rates applying to the fixed and mobile cranes on land, available for general use on the dock estate at Liverpool and Birkenhead." They were incorporated in the contract of hiring. By reg. 6: "Applicants for the use of cranes must provide all necessary slings, chains, and labour for preparing the article to be lifted, and for unshackling the same. They must also take all risks in connexion with the matter. The board do not provide any labour in connexion with the cranes except the services of the crane driver for power cranes. The drivers so provided shall be the servants of the applicants." As regarded "portable cranes," the stipulated rates varied according as they were provided "with board's driver" or "without board's driver." The respondent company were master stevedores who had hired from the appellant board the use of a portable travelling crane, together with its driver, Francis Newall, for the purpose of loading a ship called the *Port Chalmers*, lying at the quay at the North Sandon Dock, Liverpool, one of the docks of the appellant board. John McFarlane was a registered checker employed by James

Dowie & Co., the forwarding agents who had engaged the respondent company as stevedores to load the cargo on the ship. On the night of August 22, 1943, he was engaged in checking goods which were in the course of being transferred from shed to ship by means of the crane, which did not run on fixed rails but could be moved in any direction by the crane driver. The crane, which was standing in the dock shed, had picked up, under McFarlane's direction, a case of which he had to note the number and marks. While he was endeavouring to do so, instead of further movement of the crane being stopped till he could take the particulars, it was set in motion and driven on by Newall. The result was that McFarlane was trapped and struck by it and seriously injured. He brought an action for damages against the respondent company and in the alternative the appellant board, which was tried at Liverpool Assizes by Croom-Johnson J. From the evidence it appeared that the appellant board had engaged Newall, paid his wages, prescribed the jobs he should undertake and alone had power to dismiss him. The respondent company had the immediate direction and control of the operations to be executed by him with the crane, e.g., to pick up and move a piece of cargo from shed to ship, but had no power to direct how he should work the crane, the manipulation of the controls being a matter for him.

The following passages are from the evidence of Edward Pullin, head timekeeper in the employment of the respondent company: "Q. Beyond telling him to move the pile or heap " or stack from one place to another, have you any other " control over the way in which the crane is driven by the " crane driver?—A. Well, we have no control over it, the way " he drives it. We can only tell him what we want and it is not " up to us to tell him how he has to drive it or anything. If he " did not do it to our satisfaction we would certainly send in a " complaint to the dock board Q. It is very important " that stevedores should have the right to tell him not only " what to do but, in most senses, how to do it?— " A. Yes. We naturally hang the slings on and sling the stuff, " but, of course, we leave it to the crane driver to take it in his " way. We do not interfere with the driver of the crane." The following is from the evidence of John McDonough, staff foreman employed by the respondent company: "Q. What " orders did you give the crane driver in regard to the " movement of the cargo?—A. When we start we tell the

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“ crane driver to take the stuff up, to go and pick lifts up,
 “ and put the goods in No. 1 or No. 2 or any particular hatch
 “ Q. Have you anything to do, or have your men
 “ anything to do, with how he drives the crane, or when he
 “ puts his brake on, or whether he stops or anything of that
 “ kind?—A. No.” The following is from the evidence of
 Newall: “ Q. Who were you taking your orders from?—
 “ A. To take orders from the firm you are hired out, go where
 “ you are sent, do what you are told Q. In order to
 “ move [the cases] did you go with your crane and pick up one
 “ over by the door, then reverse in a semi-circle?—A. And
 “ turn head-on to the hatch Q. Did you take orders
 “ from the checker to stop half-way along in your reverse
 “ circle?—A. I take no orders from anybody.”

Croom-Johnson J., held that Newall was negligent and awarded McFarlane 247*l.* damages and costs against the appellant board on the ground that Newall was employed by them. They appealed to the Court of Appeal, not disputing that Newall was negligent or that his negligence caused the accident, but contending that at the time he was in the employment of the respondent company. The court (Scott, du Parc and Morton L.JJ.) dismissed the appeal. The appellant board appealed to the House of Lords, seeking to have the judgment against them discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against the respondent company. When the case was called on before the House it appeared that, in an effort to simplify proceedings, McFarlane, who was indifferent whether the appellant board or the respondent company were held liable to him, had not been made a party. The House, however, felt that it could not proceed to hear the appeal unless this was done and, accordingly, his name was added as a respondent. He intimated by his solicitors that he did not desire to take any part in the argument, but was ready to accept the decision of the House.

Pritchard K.C. and *Blackledge* for the appellant board. The question is who, for the purposes of the doctrine respondeat superior, was the superior of Newall on this particular occasion? At the time of the accident and for the purposes of the operation in which he was engaged, he was the servant, not of the appellants but of the respondents. In deciding otherwise the Court of Appeal was wrong (1.) because it

departed from the true principle in narrowing the idea of the nature of the control which is relevant in such a case and (2.) because it did not give full effect to the terms of the contract between the appellants and the respondents. As to control, the Court of Appeal applied the wrong test. The test is not the assumption of actual control, but the right to assume control. It is not the case that unless the right was in fact exercised by the respondents it did not pass to them. The respondents alone (a.) gave directions to Newall and (b.) had the right to control him during and for the purposes of the operation. They could have dismissed him from the particular job on which he was engaged at the time and they had entire control of his handling of the crane. It would be absurd if one master could control him in the operation of one part of the crane machinery and another master in the operation of another part. The appellants had no right to control him during this work. Even if the test suggested in *Nicholas v. F. J. Sparkes & Son* (1) was correct and adequate, Newall was obeying the express or implied order of the respondents in moving the crane where necessary for the collection and removal of the cargo. He had been transferred to their service for the purpose of this job. The question whether such a transfer has occurred depends on the nature of the work which is being done. There is, in the employment of a specialist such as this man, a no-man's-land in which neither his general nor his particular employer interferes with him and matters in which he would not be controlled by anyone must be left out of consideration in solving such a problem as the present. The principle is that if the purpose for which the man is lent is one in which the general master has an interest, the general master may be liable for his negligence, but otherwise his service is transferred. If the general master has handed over the servant to a specialist for special work, such as stevedoring, the man becomes the servant of the specialist for that work for that time. In the case of owners of cabs or taxis they send out their servants under their general orders to pick up passengers who are unknown factors. The operation is simply the operation of driving, whereas the use of a crane is in quite a different category. The mere hire of a cab does not transfer the servant who drives it, since the owner always has an interest in what is done, inasmuch as it is his business always to have cabs on the streets with drivers and passengers.

(1) [1945] K. B. 309, 311, 312.

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H. L. (E.) Here the unloading of the ship is only the particular master's concern. The test is: Who's work was the man doing? What job was he on and who had control of that job? Newall himself said in evidence that his duty ~~was~~ to take orders from the firm he was hired out to, to go where he was sent and do what he was told. He was one of the respondents' team operating for their benefit, working in conjunction with them in the process of loading the ship. This case comes within the statement of principle in *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (1), and the same inferences of fact should also be drawn. There was a transfer of Newall to the service of the respondents similar to the transfer in the cases of *Rourke v. White Moss Colliery Co.* (2) and *Jones v. Scullard* (3). Further, by the express terms of the written contract (reg. 6) it was agreed between the appellants and the respondents that during the period of the hiring of the crane Newall should be the servant of the respondents. This is the best evidence that his services were for this purpose transferred to them. His employment consisted of a series of hirings under the regulations and it was a term of his general employment that he consented to all necessary effects of their wording, including reg. 6; see *Bain v. Central Vermont Ry. Co.* (4). [They referred to *Murray v. Currie* (5); *Johnson v. W. H. Lindsay & Co.* (6); *Cameron v. Nystrom* (7); *M'Cartan v. Belfast Harbour Commissioners* (8); *Waldock v. Winfield* (9); *Dewar v. Tasker & Sons, Ltd.* (10); *Poulson v. John Jervis & Sons, Ltd.* (11); *Société Maritime Française v. Shanghai Dock & Engineering Co., Ltd.* (12); *A. H. Bull & Co. v. West African Shipping Agency & Lighterage Co.* (13); *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (14) and *Laugher v. Pointer* (15).]

Clothier K.C. and *Nicklin* for the respondent company. Newall was at all times the servant of the appellant board. The contract between the appellants and the respondents,

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| (1) [1893] 1 Q. B. 629, 632, 634. | (8) [1911] 2 I. R. 143. |
| (2) (1875) 1 C. P. D. 556; | (9) [1901] 2 K. B. 596. |
| (1877) 2 C. P. D. 205. | (10) (1907) 23 T. L. R. 259. |
| (3) [1898] 2 Q. B. 565, 573. | (11) (1919) 122 L. T. 471, 476. |
| (4) [1921] 2 A. C. 412, 414. | (12) (1921) 90 L. J. (P. C.) 85. |
| (5) (1870) L. R. 6 C. P. 24. | (13) [1927] A. C. 686. |
| (6) [1891] A. C. 371, 382. | (14) [1942] A. C. 509. |
| (7) [1893] A. C. 308. | (15) (1826) 5 B. & C. 547, 555. |

in particular reg. 6, is irrelevant to the point here in question. It cannot bind third parties, though it may assist the court to discover what were the respective functions of different servants. This was recognized in *Bain v. Central Vermont Ry. Co.* (1). The question here, as in all such cases, is one of fact. The point is to find, not the notional employer, but the employer in fact, and one cannot by the form of an agreement affect the natural and proper legal implications to be drawn from facts. One could not, for example, affect them by an agreement with a man of straw. *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (2) and *Rourke v. White Moss Colliery Co.* (3) do not assist the appellants on the point of control. The decision in these two cases is to be justified by the fact of there having been a long-term or indefinite lending and by the freely negotiated character of the agreements. Further, in the former case, the court had not appreciated the significance of the signals. The giving of a signal to the crane driver is not an order, but an intimation that the time has come for him to start his work. The law laid down in *Cairns v. Clyde Navigation Trustees* (4) is correct. *Donovan's* case (2) and *Rourke's* case (3) do not differ in principle. In all the cases on this point the common principle is that the general employers are *prima facie* liable and that on them rests the onus of showing that the liability has passed to the particular employers: see *Nicholas v. F. J. Sparkes & Son* (5); *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (6) and the observations in the Court of Appeal in the present case (7). The presumption is very much against any such transfer. This is necessary in the interests of the workman, who must know who his employer is. He ought to be able to assume that the person who pays him and who asserts the right to dismiss him is in fact his master, since a mere hirer might be a man of straw. Moreover, the workman normally chooses his own master. For these reasons the terms of the contract between the appellants and the respondents has not a decisive effect: see *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (8). The negligence of Newall was in the manner of his driving, i.e., in doing the work of the appellants.

Pritchard K.C. in reply. The contract between the appellants

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(1) [1921] 2 A. C. 412.

(2) [1893] 1 Q. B. 62.

(3) 2 C. P. D. 205.

(4) (1898) 25 R. 1021.

(5) [1945] K. B. 309, 311, 312.

(6) [1942] A. C. 509, 517.

(7) [1945] K. B. 301, 306.

(8) [1942] A. C. 509, 518.

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and the respondents is relevant. If A, who is the employer of X, has procured him to do a wrong to Y he is liable, not as master, but as the procurer of the wrong, but if he did not procure X to do the wrong and is to be made liable on the principle of respondeat superior, the court must look at the contract of service under which X was working, and unless it establishes that he was working for A the action must fail on that point; thus that contract between other persons may have legal consequences for the injured man, Y. Further, if Y seeks to hold B liable on the principle of respondeat superior because of a contract between A and B, that contract also may affect his rights. In the present case the contract should be looked at to determine the status of the crane driver, especially as he must be taken to have acquiesced in all the necessary effects of the regulations: see *Bain v. Central Vermont Ry. Co.* (1) and *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (2). With regard to *Rourke v. White Moss Colliery Co.* (3), the respondents relied on the long-term arrangements made and the freedom of negotiation, but in the present case the period of the hiring was quite indefinite and there was likewise freedom of negotiation, since there was no obligation on the respondents to procure cranes from the appellants. As regards the significance of signals to which reference was made in connexion with *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (4), the signals in the present case were just as much indications of orders given by the respondents as were the signals in *Bain v. Central Vermont Ry. Co.* (5). The presence or absence of a case to be lifted constituted the signal, in the existing circumstances of a team working together. The crane driver's negligence was in the manner of his doing the respondents' work. He was working for them as one of their team; see *Short v. J. & W. Henderson, Ltd.* (6). It is a reasonable inference that those who are in charge of an operation retain control over those who are engaged in it. The key to the whole decision in *Donovan's* case (7) is that Jones & Co., the wharfingers and not the defendants, the owners of the crane, were loading the ship. The same is true in the present case.

The House took time for consideration.

(1) [1921] 2 A. C. 412, 414.

(2) [1942] A. C. 509, 515.

(3) 2 C. P. D. 205.

(4) [1893] 1 Q. B. 62.

(5) [1921] 2 A. C. 412.

(6) (1946) 174 L. T. 417.

(7) [1893] 1 Q. B. 629.

July 28. VISCOUNT SIMON. My Lords, in this appeal the Mersey Docks and Harbour Board (hereinafter called the appellant board) against whom a plaintiff named John McFarlane has obtained judgment at Liverpool Assizes for 247*l.* damages with costs on the ground of negligence in the working of a mobile crane belonging to the appellant board, seeks to have the judgment against the appellant board discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against Coggins & Griffith (Liverpool), Ltd., the respondent company, who are master stevedores and who had hired from the appellant board the use of the crane, together with its driver, for the purpose of loading a ship called the *Port Chalmers* lying at the quay at the North Sandon Dock, Liverpool. The question in the case is, therefore, whether Newall, the driver of the crane, is to be regarded, for the purpose of McFarlane's claim, as employed by the appellant board or by the respondent company. Both the trial judge, Croom-Johnson J., and the Court of Appeal (Scott, du Parc and Morton L.J.J.) held that the appellant board was responsible to the plaintiff for Newall's negligence, but the appellant board contends that Newall was not at the time of the accident and for the purpose of the operation in which he was then engaged a servant of the appellant board but was the servant of the respondent company. When the case was called on before the House it appeared that, in an effort to simplify proceedings, the appellant board and the respondent company were the only parties before us, and it was pointed out that McFarlane, who in the action had sued both these parties in the alternative, was indifferent as to which of them was pronounced to be liable to him as, once he had established that his injuries were due to Newall's negligence, he was bound to get payment from one or other. The House, however, felt that it could not proceed to hear the appeal unless McFarlane was made a party to it, since your Lordships were being asked to reverse a judgment which he had obtained. The petition of appeal was therefore varied by adding McFarlane's name as a respondent and he intimated through his solicitors that he did not desire to take part in the argument but was ready to accept the decision of the House on the question which of the two original defendants was liable to him. What has now to be decided is whether, in applying the doctrine of respondeat superior, liability attaches on these facts to the appellant board as the regular employers

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H. L. (E.) of Newall or to the respondent company as the persons who were temporarily making use of the crane which Newall was driving. The appellant board had engaged Newall, and it paid his wages: it alone had power to dismiss him. On the other hand, the respondent company had the immediate direction and control of the operations to be executed by the crane driver with his crane, e.g., to pick up and move a piece of cargo from shed to ship. The respondent company, however, had no power to direct how the crane driver should work the crane. The manipulation of the controls was a matter for the driver himself. In the present case the accident happened because of the negligent way in which the crane driver worked his crane, and since the respondent company had no control over how he worked it, as distinguished from telling him what he was to do with the crane, it seems to me to follow that Newall's general employers must be liable for this negligence and not the hirers of the apparatus.

Mr. Pritchard placed much reliance upon the language of reg. 6. But when the plaintiff has proved injury caused by the negligence of Newall, and the question arises who is answerable as "superior" for such negligence, this question is not to be determined by any agreement between the owner and the hirer of the crane, but depends on all the circumstances of the case. Even if there were an agreement between the appellant board and the respondent company that in the event of the appellant board being held liable for negligent driving of the crane while it is under hire to the latter, the latter will indemnify the appellant board, this would not in the least affect the right of the plaintiff to recover damages from the appellant board as long as the appellant board is properly to be regarded as the crane driver's employer. It is not disputed that the burden of proof rests on the general or permanent employer—in this case the appellant board—to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances. It is not easy to find a precise formula by which to determine what these circumstances must be. In the century-old case of *Quarman v. Burnett* (1), which has always been treated as a

guiding authority, the defendants owned a carriage, but habitually hired from a jobmaster horses to draw it : the jobmaster also supplied a regular driver who wore a livery provided by the defendants. It was decided that the defendants were not liable for the results of the driver's negligence in leaving the horses unattended. The ground of the decision is that the defendants had no control over the way in which the horses were handled, though they could direct the driver where and when to drive. The test suggested by Bowen L.J. in *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (1) when he said "by the employer is meant the person who has a right at the moment to control the doing of the act" can be understood in this sense, and in this sense I would accept it : i.e., "to control the doing of the act" would mean "to control the way in which the act involving negligence was done." I find it somewhat difficult, however, to fit the facts in *Donovan's* case (1) into this proposition, and if that decision is upheld, it must be on the basis found in the words of Lord Esher M.R., when he said (2) : "The man was bound to work the crane according to the orders and under the entire and absolute control of" the hirers. But, as the House of Lords insisted in *M'Cartan v. Belfast Harbour Commissioners* (3), the value of an earlier authority lies, not in the view which a particular court took of particular facts, but in the proposition of law involved in the decision. In *M'Cartan's* case (4) Lord Dunedin referred to, and expressly approved, the judgment of Lord Trayner in *Cairns v. Clyde Navigation Trustees* (5), which, on facts closely resembling the present, held that the trustees as general employers were in law liable for the negligent driving of a crane which they had let out with its driver for discharging a ship. Notwithstanding the dictum of Bowen L.J. in *Donovan's* case (1), the principle of the carriage cases and the crane cases appears to me to be the same : I would especially refer to what Lord Dunedin said in *M'Cartan's* case (6).

The Court of Appeal in this case (7), following its own decision in the case of *Nicholas v. F. J. Sparkes & Son* (8), applied a test it had formulated, where a vehicle is lent with

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(1) [1893] 1 Q. B. 629, 634.

(2) Ibid. 632.

(3) [1911] 2 I. R. 143, 145, 149.

(4) Ibid. 150.

(5) (1898) 25 R. 1021.

(6) [1911] 2 I. R. 143, 151.

(7) [1945] K. B. 301, 307.

(8) [1945] K. B. 309, 312.

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 MERSEY " doing of the negligent act was the workman exercising the
 DOCKS AND " discretion given him by his general employer, or was he
 HARBOUR " obeying or discharging a specific order of the party for
 BOARD " whom, upon his employer's direction, he was using the
 v. " vehicle . . . ? " I would prefer to make the test turn on
 COGGINS & where the authority lies to direct, or to delegate to, the
 AND workman, the manner in which the vehicle is driven. It is
 GRIFFITH this authority which determines who is the workman's
 (LIVERPOOL), " superior." In the ordinary case, the general employers
 LD. exercise this authority by delegating to their workman
 Lord Simon discretion in method of driving, and so the Court of Appeal
 correctly points out (1) that in this case the driver Newall,
 " in the doing of the negligent act, was exercising his own
 " discretion as driver—a discretion which had been vested in
 " him by his regular employers when he was sent out with the
 " vehicle—and he made a mistake with which the hirers had
 " nothing to do." (If however the hirers intervene to give
 directions as to how to drive which they have no authority to
 give, and the driver pro hac vice complies with them, with the
 result that a third party is negligently damaged, the hirers
 may be liable as joint tort-feasors. I move that the appeal
 be dismissed with costs.

LORD MACMILLAN (read by LORD PORTER). My Lords, the only question for your Lordships' determination is whether on the principle of respondeat superior, the responsibility for the negligence of the driver of the crane lies with the stevedores or with the appellant board, whom the plaintiff sued alternatively. The answer depends on whether the driver was acting as the servant of the stevedores or as the servant of the appellant board when he set the crane in motion. That the crane driver was in general the servant of the appellant board is indisputable. The appellant board engaged him, paid him, prescribed the jobs he should undertake and alone could dismiss him. The letting out of cranes on hire to stevedores for the purpose of loading and unloading vessels is a regular branch of the appellant board's business. In printed regulations and rates issued by the appellant board the cranes are described as " available for general use on the dock estate " at Liverpool and Birkenhead." and as regards portable cranes the stipulated rates vary according as they are provided " with board's driver " or " without board's driver." Prima

(1) [1945] K. B. 301, 307.

facie therefore it was as the servant of the appellant board that Newall was driving the crane when it struck the plaintiff. But it is always open to an employer to show, if he can, that he has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts. The burden is on the general employer to establish that such a transference has been effected. Agreeing, as I do with the trial judge and the Court of Appeal, I am of opinion that, on the facts of the present case, Newall was never so transferred from the service and control of the appellant board to the service and control of the stevedores as to render the stevedores answerable for the manner in which he carried on his work of driving the crane. The stevedores were entitled to tell him where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do; but they had no authority to tell him how he was to handle the crane in doing his work. In driving the crane, which was the appellant board's property confided to his charge, he was acting as the servant of the appellant board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff; it was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the appellant board to do.

Mr. Pritchard, in his admirable argument on behalf of the appellant board, sought to make out that the true view was that Newall was a participant with the stevedores' men in the common task or enterprise of loading the ship and that for this purpose he had become temporarily the servant of the stevedores and subject to their control. But I have already pointed out that Newall was never subjected to the orders and control of the stevedores in the only relevant matter of the driving of his crane, as to which the stevedores had neither expert knowledge nor responsibility. Reference was also made to art. 6 of the appellant board's regulations which states that drivers provided by the appellant board "shall be the servants of the applicants," that is, of the parties to whom they are hired. But this does not mean that the appellant board's drivers cease to be the servants of the appellant board when they accompany cranes, which the

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appellant board lets out on hire. Servants cannot be transferred from one service to another without their consent and even where consent may be implied there will always remain a question as to the extent and effect of the transfer. Here the driver became the servant of the stevedores only to the extent and effect of his taking directions from them as to the utilization of the crane in assisting their work, not as to how he should drive it. Many reported cases were cited to your Lordships but where, as all agree, the question in each case turns on its own circumstances, decisions in other cases are rather illustrative than determinative. So far as attempts have been made to formulate a criterion of general application it cannot be said that these attempts have been very successful. Counsel for the appellant board very naturally placed much reliance on the case of *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (1), where the facts bore a considerable resemblance to those in the present case and where stevedores were held liable for the negligence of the driver of a crane hired by them. The current of subsequent authorities has set against this case and the opinions of the learned judges who have commented on it have been largely concerned with distinguishing and explaining it, if not explaining it away. If the ground of judgment in *Donovan's* case (2) is to be found in the words of Lord Esher M.R., where he says that the crane driver "was bound to work the crane "according to the orders and under the entire and absolute "control of Jones and Co." the wharfingers, then it is enough to say that in my opinion the position of Newall vis-à-vis the stevedores, the respondents in the present case, cannot be so described. More satisfactory guidance is to be found in the opinions expressed in this House in *M'Cartan v. Belfast Harbour Commissioners* (3). There Lord Dunedin found himself in entire agreement with Lord Trayner's judgment in *Cairns v. Clyde Navigation Trustees* (4) and both these cases were in turn followed in *Ainslie v. Leith Harbour and Docks Commissioners* (5), where Lord Mackenzie discusses the matter fully and convincingly. The facts in those three cases were in all material respects identical with the facts in the present case and in each the same decision was reached, and the dock authority held liable. I find ample warrant in them for my

(1) [1893] 1 Q. B. 629.

(4) 25 R. 1021.

(2) Ibid. 632.

(5) 1919 S. C. 576.

(3) [1911] 2 I. R. 143, 150.

view, which I understand all your Lordships share, that the appeal should be dismissed.

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LORD PORTER. My Lords, I need not repeat the facts giving rise to the question to be determined in this appeal. That question is whose servant was the crane driver, Francis Newall, at the time of the accident. As to this matter I find myself in agreement with those members of your Lordships' House who sat to hear the appeal and only desire to add a few observations as to the principles concerned. In determining this question it has to be borne in mind that the employee's position is an important consideration. A contract of service is made between master and man and an arrangement for the transfer of his services from one master to another can only be effected with the employee's consent, express or implied. His position is determined by his contract. No doubt by finding out what his work is and how he does it and how he fulfils the task when put to carry out the requirements of an employer other than his own, one may go some way towards determining the capacity in which he acts, but a change of employer must always be proved in some way, not presumed. The need for a careful consideration of the circumstances said to bring about the change of employment has latterly been accentuated by the statutory provisions now in force for compulsory health and accident insurance and, in the case of many firms, by the existence of funds accumulated under a trust for the benefit of employees who will not lightly incur the risk of losing such benefits by a transfer of their services from one master to another. Nor is it legitimate to infer that a change of masters has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. A contract of this kind may of course determine the liability of the employers inter se, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion.

The indicia from which the inference of a change is to be derived have been stated in many different ways, notably in the words of Bowen L.J. in *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (1), where he says: "There are

(1) [1893] 1 Q. B. 629, 634.

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" his machines. He may contract to do the work and, the
 " end being prescribed, the means of arriving at it may be left
 " to him, or he may contract in a different manner and, not
 " doing the work himself, may place his servants and plant
 " under the control of another—that is, he may lend them—
 " and in that case he does not retain control over the work."
 He adds, and Lord Esher M.R. uses the words to the same
 effect: " It is clear here that the defendants placed their man
 " at the disposal of Jones & Co. and did not have any control
 " over the work he was to do." In that case, as in this, a
 crane driver was lent to a firm of stevedores to enable them
 to load a ship and an employee of the wharfingers whose duty
 it was to direct the working of the crane was injured by the
 driver's negligence. In these circumstances it was held that his
 general employers were not liable, as they had parted with the
 power of controlling him. The appellants strongly relied
 upon both the inference drawn from the facts and the statement
 of principle contained in that case. If that statement means
 that the employer on whose work the man was engaged controlled
 both the object to be achieved and the method of
 performance I should think a finding, that that employer was
 liable, justified, but whether in view of the later decision of
M'Cartan v. Belfast Harbour Commissioners (1) in your Lord-
 ships' House the same inference would now be drawn from the
 facts proved in evidence in *Donovan's* case (2) may be doubted.
 The decision itself is justified upon the finding of fact that all
 control had passed to the temporary master. A number of
 other tests have been suggested as helping to determine in
 particular cases under which of two employers the man was
 working at the relevant time. The appellant quoted and relied
 upon, amongst others, *Rourke v. White Moss Colliery Co.* (3),
 where the words were " actually employed to do their work,"
 and *Johnson v. W. H. Lindsay & Co.* (4), where the phrase,
 " working . . . to a common end," was used. For myself,
 I do not find much assistance in the circumstances of the
 present case from such expressions, especially as they were
 used with reference to men who had left their ordinary employ-
 ment and taken on work for another employer, as distinguished
 from those who continued to do their ordinary work, though
 no doubt from time to time subjected to the directions of a
 third party as to the work they were to do.

(1) [1911] 2 I. R. 143.

(3) 2 C. P. D. 205, 208.

(2) [1893] 1 Q. B. 629.

(4) [1891] A. C. 371, 382.

Many factors have a bearing on the result. Who is pay- master, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required : the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident. I cannot think that such a conclusion is to be drawn from the facts established. I would dismiss the appeal.

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LORD SIMONDS (read by LORD UTHWATT). My Lords, I agree that this appeal should be dismissed. The facts and the somewhat unusual manner in which the case has been brought before this House have already been stated. I will only emphasize that the single question for your Lordships is whether the appellants are answerable to the respondent McFarlane under the maxim " respondeat superior " for the tortious act of one Newall. The question whether, if they are so answerable, they have any rights against the respondents Coggins & Griffith (Liverpool), Ltd. (whom I will call " the

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“respondents”), is not here relevant. It is not disputed that at the time when the respondents entered into a contract with the appellants under which the latter were to supply the former with the service of a crane and craneman, Newall was the servant of the appellants. He was engaged and paid and liable to be dismissed by them. So also, when the contract had been performed, he was their servant. If then in the performance of that contract he committed a tortious act, injuring McFarlane by his negligence, they can only escape from liability, if they can show that *pro hac vice* the relation of master and servant had been temporarily constituted between the respondents and Newall and temporarily abrogated between themselves and him. This they can do only by proving, in the words of Lord Esher M.R. in *Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd.* (1) that “entire and absolute control” over the workman had passed to the respondents. In the cited case the court held upon the facts that the burden of proof had been discharged and I do not question the decision. But it appears to me that the test can only be satisfied if the temporary employer (if to use the word “employer” is not to beg the question) can direct not only what the workman is to do but also how he is to do it. In the case before your Lordships the negligence of the workman lay not in the performance of any act which the respondents could and did direct and for which, because they procured it, they would be responsible, but in the manner in which that act was performed, a matter in which they could give no direction and for which they can have no responsibility.

The doctrine of the vicarious responsibility of the “superior,” whatever its origin, is to-day justified by social necessity, but, if the question is where that responsibility should lie, the answer should surely point to that master in whose act some degree of fault, though remote, may be found. Here the fault, if any, lay with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. If an accident then occurred through his negligence that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice. Suppose that the negligence of the craneman had resulted in direct damage to the respondents, I do not see how the appellants could

(1) [1893] 1 Q. B. 629, 632.

escape liability. For the obligation to supply a crane and a man to work it is an obligation to supply a crane which is not defective and a man who is competent to work it. It would be a strange twist of the law if, the negligence resulting in damage not to the respondents but to a third party, the liability shifted from the appellants to the respondents. My Lords, I am conscious that in thus stating my view of the law I leave little room for the application of that part of the rule stated by Bowen L.J. in *Donovan's* case (1), which in certain circumstances throws vicarious responsibility upon the temporary employer. I must admit that I do not find it easy to reconcile all that that learned judge said with earlier and later authorities and I doubt whether any complete reconciliation is possible. But I would recall the words used by Lord Esher that I have already cited and the further fact that in that case the temporary employer was said to have the power of dismissing the workman. The judgment of Bowen L.J. should be read in the context of these facts, which enabled Lord Dunedin in *M'Cartan v. Belfast Harbour Commissioners* (2) to say he would have decided the case in the same way. If it were not so, the decision in *Donovan's* case (1) could not stand with the recent decision in this House in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (3) and should be regarded as overruled.

The learned counsel for the appellants laid great stress on the terms of the contract between the appellants and respondents. This contract incorporated the "regulations and rates applying to the fixed and moveable cranes on land, available for general use" prescribed by the appellants and one of these regulations was as follows: "6. . . . The board do not provide any labour in connexion with the cranes except the services of the crane drivers for power cranes. The drivers so provided shall be the servants of the applicants." With this he linked up certain answers given by Newall at the trial in which he said, inter alia, that it was his duty "to take orders from the firm you are hired out to, go where you were sent, do what you are told." The argument was that this was the best evidence that the service of Newall was pro hac vice transferred from the appellants to the respondents and that the transfer was recognized and acquiesced in by him, and reference was made to the judgment

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(1) [1893] 1 Q. B. 629.

(3) [1942] A. C. 509.

(2) [1911] 2 I. R. 143, 150.

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of the Privy Council in *Bain v. Central Vermont Ry. Co.* (1). But I do not think this argument is sound. Prima facie the contract between the appellants and respondents is not evidence against the plaintiff in determining the liability of either of them to him, though he may, if he thinks fit, adduce it in evidence for the purpose of showing what is the function of the workman in relation to one employer or the other. In this sense it may be the best evidence available against the employer. But the terms of the bargain that the driver shall be the servant of one party or the other cannot be used by either of them to contradict the fact, if it is the fact, that the complete dominion and control over the servant has not passed from one to the other. It is nothing else than an incorrect inference of law which cannot affect the rights of the plaintiff. It is vain to attempt to give to such an agreement the effect of a tripartite bargain between, e.g., two householders and a jobbing gardener by which the latter agrees to serve each of them for so many hours or days a week, in which case the gardener, if indeed he does not remain his own master throughout, is now the servant of one of them, now of the other. The observations in *Bain's* case (1), when carefully read, do not lead to any other conclusion. Nor can the answers of Newall himself displace the fact that he did not, and was not expected to, take orders from the respondents as to the way in which he should carry out their directions. As to that he said "I take no orders from anybody," a sturdy answer which meant that he was a skilled man and knew his job and would carry it out in his own way. Yet ultimately he would decline to carry it out in the appellants' way at his peril, for in their hands lay the only sanction, the power of dismissal.

Since writing this opinion I have had the advantage of reading that of my noble and learned friend Lord Macmillan. I am indebted to him for a reference to *Ainslie v. Leith Harbour and Docks Commissioners* (2) and I find in the judgment of Lord Mackenzie in that case a wholly satisfactory explanation of the word "control" in the context in which it has been used in the earlier authorities on this subject and an analysis of those authorities with which I am in full accord.

LORD UTHWATT. My Lords, arrangements for the supply by an employer of one of his workmen to a third party, whom

(1) [1921] 2 A. C. 412.

(2) 1919 S. C. 676.

I will call "the hirer," for the purposes of a particular job are common and have given rise to many disputes on the question whether, while engaged on the job, the workman for the purposes of the maxim respondeat superior is to be treated as the servant of the general employer or of the hirer. The principles established by the authorities are clear enough. The workman may remain the employee of his general employer, but at the same time the result of the arrangements may be that there is vested in the hirer a power of control over the workman's activities sufficient to attach to the hirer responsibility for the workman's acts and defaults and to exempt the general employer from that responsibility. The burden of proving the existence of that power of control in the hirer rests on the general employer. The circumstance that it is the hirer who alone is entitled to direct the particular work from time to time to be done by the workman in the course of the hiring is clearly not sufficient for that purpose. The hirer's powers in this regard are directed merely to control of the job and the part the workman is to play in it, not to control of the workman, and the workman in carrying out the behests of the hirer as to what is to be done is not doing more than implementing the general employer's bargain with the hirer and his own obligations as a servant of his general employer. To establish the power of control requisite to fasten responsibility on him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character. Unless there be that authority the workman is not serving the hirer, but merely serving the interests of the hirer, and service under the hirer in the sense I have stated is essential. Whether there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the arrangement made: see *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (1). It may be an express term of the bargain between the general employer and the hirer, that the workman is to be the servant of the hirer or is to be subject in all respects to his authority. That in my opinion does not of itself determine the workman's position. The workman's assent, express or implied, to such a term would, I think, conclude the

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point one way : and his dissent conclude it the other way. In cases where the point cannot be disposed of in this fashion, the nature of the activities proper to be demanded of the workman by the hirer and the relation of those activities to the activities of the hirer's own workmen, are of outstanding importance in determining whether the hirer has in any reasonable sense authority to control the manner of execution of the workman's task. For instance, the position under the hirer of a craftsman entrusted for the hirer's purposes with the management of a machine belonging to his general employer, that machine demanding for its proper operation the exercise of technical skill and judgment, differs essentially from the position under the hirer of an agricultural labourer hired out for a period of weeks for general work. In the case of the craftsman the inference of fact may be drawn that he was not the servant of the hirer even though the bargain provided that he should be ; and in the case of the agricultural labourer the inference of fact may be that he became the servant of the hirer, though the bargain provided that he should not be. The realities of the matter have to be determined. The terms of the bargain may colour the transaction ; they do not necessarily determine its real character.

The facts of this case have already been stated and I do not propose to travel over them again. There is, however, one matter in the evidence to which reference should be made. The hiring agreement contained the following provision : " The drivers so provided " (i.e., the crane drivers) " shall be the " servants of the applicants " (i.e., the respondent company). There is no evidence that the workman agreed to this provision or was indeed aware of it. Without his consent he could not be made the servant of the respondent company. In light of the circumstances it is impossible to construe the provision as authorizing the respondent company to direct the manner in which the workman should do his work and for the purpose in hand I read the provision merely as stating what the appellant board and the respondent company agreed should be the legal result of an arrangement the operative terms of which are to be found elsewhere. Their agreement on a matter of law is immaterial. For the purposes of this case this point may be left there.

Applying the general principles which I have stated to this case the particular question to be determined is whether or not the respondent company had the authority to give

directions as to the manner in which the crane was to be operated. To my mind it is clear they were not intended to have and did not have any such authority. The manner in which the crane was to be operated was and remained exclusively the workman's affair as the servant of the appellant board. The workman in saying in his evidence "I take no orders from anybody" pithily asserted what was involved in the hiring out of the crane committed to his charge by the appellant board, and, so far as the respondent company was concerned, gave an accurate legal picture of his relations to the respondent company. The respondent company's part was to supply him with work; he would do that work but he was going to do it for the appellant board as their servant in his own way.

With respect to the authorities I find myself in complete agreement with the observations made by the noble and learned Lord on the woolsack and I desire to refer to one matter only. The test suggested in *Nicholas v. F. J. Sparkes & Son* (1) was as follows: "One test in cases of a vehicle . . . lent with its "service to a hirer, is this question: 'In the doing of the "negligent act was the workman exercising the discretion "given him by the general employer or was he obeying " . . . a specific order of the party for whom upon his "employer's direction he was using the vehicle . . . ?'" The test is not I think correct and to my mind the second question contained in the test leads to confusion. The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority its exercise or non-exercise on the occasion of the doing of the act is irrelevant. The hirer is liable for the wrongful act of the workman, whether he gave any specific order or not. Where there is no such authority vested in the hirer, he may, by reason of the giving of a specific order, be responsible for harm resulting from the negligent execution of that order. But it is not every order given by the hirer that will result in liability attaching to him. The nature and terms of the order have to be considered. For instance, an order given in the case under consideration to unload cargo from a particular hold in the ship would not—assuming that to be a proper operation—subject the hirer to liability for damage resulting from any negligent driving of the crane in carrying out the order. And lastly, where

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liability does attach to the hirer by reason of a specific order, that liability arises by the reason that in the particular matter he was a joint tortfeasor with the workman. The general relation arising out of the contract of hiring is in no way involved. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Gregory Rowcliffe & Co. for R. H. Bransbury, Liverpool.*

Solicitors for respondents: *Botterell & Roche for Weightman, Pedder & Co., Liverpool.*

J. C.*

[PRIVY COUNCIL.]

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TREASURER OF ONTARIO APPELLANT ;

AND

BLONDE AND OTHERS RESPONDENTS.

TREASURER OF ONTARIO APPELLANT ;

AND

ABERDEIN AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Revenue—Succession duty—Company shares—Situs—Alternative places of transfer—Selection on rational grounds—Not “property situate in Ontario”—Succession Duty Act, 1934, c. 55, (Ontario), s. 6, sub-s. 1—Succession Duty Act, 1939 (2nd Session), c. 1 (Ontario), s. 5.

The adoption of the place of transfer of registered shares in a company as the leading consideration in determining the situs of the shares for the purposes of death duties involves the corollary that, if there be, outside the jurisdiction in which it is suggested that the shares are situate, several places where transfers can be effectively carried through in the ordinary course of business, and there is no place within the jurisdiction where a transfer can be carried through, the shares cannot be situate within the jurisdiction. Where, therefore, shares owned by a testator in two companies incorporated under the law of the State of Michigan, U.S.A., could only be transferred in Michigan and New York in the ordinary course of business, and could not be transferred within Ontario at all, they were not “property situate in Ontario” within the meaning of s. 6, sub-s. 1, of the Succession Duty Act, 1934, of Ontario, and the domicile of

* *Present*: VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

the testator in Ontario at the date of his death, the grant of probate there and the presence in Ontario of the share certificates—which had not been endorsed in blank or otherwise—were irrelevant.

If there are two places where shares can be effectively transferred, one within and the other outside the jurisdiction, a selection of one of the alternative places as the place of transfer for the shares should, if possible, be made on rational grounds. Where, therefore, a testator owned shares, in two companies incorporated respectively under the Canadian and the Ontario Companies Acts, which could be transferred either in New York, U.S.A., or Toronto, Ontario, and died domiciled and resident in Massachusetts, where all the share certificates were—none of which had been endorsed in blank or otherwise by the testator—and probate in Ontario was not necessary to enable the executors to be registered on the New York register, in substance for transfer purposes New York occupied the field, and, without leaving the region of transfer, there was sufficient ground to enable a selection to be made between New York and Ontario, and the shares were not, according to the law of Ontario, situate in Ontario.

Principle in *Rex v. Williams* [1942] A. C. 541, applied.

Judgments of the Court of Appeal for Ontario [1941] O. R. 227, at 236, and [1945] O. R. 206, at 213, affirmed.

APPEALS (No. 43 of 1941 and No. 3 of 1946), the first from a judgment of the Court of Appeal for Ontario (June 24, 1941) reversing a judgment of Rose C.J. (February 19, 1941) on a special case stated, the second from so much of the judgment of the Court of Appeal for Ontario (February 16, 1945) as affirmed a judgment of Kelly J. (May 27, 1944).

The following facts are taken from the judgment of the Judicial Committee. In the first appeal, *Treasurer of Ontario v. Frances Eugenia Blonde and Others*, the testator, A. T. Montreuil, at the date of his death on October 2, 1936, was the registered owner of certain fully paid shares in the capital stock of Briggs Manufacturing Co. and Pfeiffer Brewing Co. Each of those companies was incorporated under the law of the State of Michigan, U.S.A., and had its head office in Detroit. Each company had duly appointed transfer agents in Michigan and New York and all the shares of each company could be transferred at either place on production of the relative share certificate. No other transfer office was maintained by either company. At the date of his death, the testator was domiciled and resident in Ontario and the share certificates were in his possession in Ontario. None of them had been endorsed in blank or otherwise. Probate of the testator's will was, on October 29, 1936, granted

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to his executors in Ontario. In those circumstances proceedings were taken by the Treasurer of Ontario to recover succession duty from the executrices of Montreuil's estate pursuant to the Succession Duty Act, 1934, of Ontario. The only point at issue was whether the shares were at the date of the testator's death "property situate in Ontario" within the meaning of s. 6, sub-s. 1, of that Act.

The Court of Appeal for Ontario (Robertson C.J.O., Middleton, Henderson and Gillanders JJ.A., Masten J.A. dissenting), reversing the trial judge (Rose C.J.) held that the shares were not situate in Ontario. The hearing of the case in Canada and the lodging of the present appeal by the Treasurer took place before the decision of their Lordships of the Judicial Committee in *Rex v. Williams* (1).

In the second appeal, *Treasurer of Ontario v. Aberdeen and Others*, the testator, J. D. Aberdeen, was, at the date of his death on December 11, 1940, the registered owner of certain shares in the capital stock of Dome Mines, Ltd. He and his wife were also the joint registered owners with right of survivorship of shares in the capital stock of Nipissing Mines, Ltd. Dome Mines, Ltd. was incorporated under the Companies Act of Canada, and Nipissing Mines, Ltd. was incorporated under the Companies Act of Ontario. The head office of both companies was in Ontario. Under the Ontario Companies Act Nipissing Mines, Ltd. was bound to keep a register of members in Ontario. Each company had duly appointed transfer agents in Toronto and in New York, and all the shares of each company could be transferred at the offices of the transfer agents in either place. There was no other place at which transfers could be carried through. At each of the transfer offices the survivor of shares held in two joint names could, by taking the appropriate steps, secure registration in his name. The shares in each company were listed and actively dealt with on the stock exchanges of Toronto and New York. At the date of the death of the testator he and his wife were domiciled and resident in the Commonwealth of Massachusetts and all the share certificates were in Massachusetts. None of them had been endorsed in blank or otherwise by the testator. In those circumstances proceedings were taken by the Treasurer of Ontario to recover succession duty from the executors of Aberdeen's estate and Mrs. Aberdeen pursuant to the Succession Duty Act, 1939, of

Ontario. Under s. 1 of that Act property passing on the death of the deceased included joint property (subject to an exception here immaterial). The only point at issue was whether the shares in the two companies were at the testator's death "property situate in Ontario" within the meaning of s. 5 of that Act. At the hearing evidence was led as to the law of New York relating to the situs of shares. The broad effect of that evidence was that for the purpose of taxation the shares here in question did not under that law have a situs in New York.

The trial judge (Kelly J.) and the Court of Appeal (Robertson C.J.O., Henderson and Gillanders J.J.A.), for the reasons given in their judgments in *The King v. The Globe Indemnity Company of Canada* (1), held that the shares were not situate in Ontario. Against that decision the Treasurer of Ontario appealed.

1946. June 27, 28. *C. R. Magone K.C.* (of the Canadian Bar) for the appellant in the first appeal, read the judgment of the Board in *Rex v. Williams* (2), delivered since this appeal was filed some years ago, and continued: A great deal of emphasis seems to have been placed in that case on the fact that the share certificates were in Buffalo, New York State, and that the executors could not be compelled to part with them. In the present case I am laying emphasis on the fact that the share certificates were in Ontario. Where shares can be effectively dealt with in more than one jurisdiction the places where the certificates are found is the determining factor: *Stern v. The Queen* (3), *Attorney-General v. Bouwens* (4), *In re Clark* (5) and *In re Aschrott* (6). *Stern's* case (3) may be particularly mentioned as closely resembling the present case. In each of the following Canadian cases it was found that because the certificate was in a Province where there was a transfer office where the shares could be effectively dealt with, that determined the situs: *Re MacFarlane* (7), *Toronto General Trusts v. The King* (8), *Rice v. The King* (9) and *Ivey v. The King* (10). It was said in *Rex v. Williams* (11) that

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(3) [1896] 1 Q. B. 211.

(4) (1838) 4 M. & W. 171.

(5) [1904] 1 Ch. 294.

(6) [1927] 1 Ch. 313.

(7) [1933] O. R. 44 (C. A.).

(8) [1938] 1 D. L. R. 40.

(9) [1939] 4 D. L. R. 701.

(10) [1939] 1 D. L. R. 631.

(11) [1942] A. C. 541, 560.

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" nothing effective could lawfully be done there [Ontario]
 " without producing the certificates, and the legal personal
 " representatives in Buffalo could not be compelled to part
 " with them to enable the transfers to be effected in Ontario
 " rather than at Buffalo." It is submitted that unless the
 certificate is found in the State or Province where the transfer
 office is the shares cannot have a situs in that State or
 Province. As in the *Stern* case (1), they could be treated as
 valuable documents in the hands of the executors. In cases
 where there are two or more transfer offices in no case can it be
 found that the situs has been held to be at a place where the
 certificate was not situated. [Reference was also made to
Lord Sudeley v. Attorney-General (2), *Attorney-General v.*
Higgins (3) and *Brassard v. Smith* (4)]. Here the certifi-
 cates were found at the death in Ontario, where the testator
 was domiciled, and the shares in question could not be
 transferred on the books of the transfer agents of the com-
 panies in Michigan and New York unless the certificates were
 produced. The Ontario probate gave the executors a right to
 the possession of the certificates, and they could endorse them
 for transfer as effectively as could the owner when living.
 The shares were locally situate in Ontario at the date of
 death for the purposes of the Succession Duty Act, 1934,
 and subject to succession duty.

F. K. Jasperson (of the Canadian Bar) for the respondents,
 was not called on.

June 28, 1946. *C. R. Magone K.C.* for the appellant in the
 second appeal. The question is the same as in the previous
 appeal—whether or not the shares were property situate in
 Ontario at the date of the testator's death. Where shares
 may at the date of death be effectively transferred in either
 of two places—here, in the State of New York and in the
 Province of Ontario—the situs of such shares must be within
 one place or the other, and the selection must be made on
 rational grounds: *Rex v. Williams* (5). The solution must be
 the same in this case as it would be if the testator had been
 domiciled, say in Manitoba, and duplicate transfer offices
 were in two other provinces of Canada. Domicile has nothing
 to do with situs: *Rex v. Williams* (5), where it was said

(1) [1896] 1 Q. B. 211.

(2) [1897] A. C. 11.

(3) (1857) 2 H. & N. 339.

(4) [1925] A. C. 371.

(5) [1942] A. C. 541, 554, 560.

" their Lordships must reject the notion that the domicile of " the deceased has anything to do with the situs of the " property." On rational grounds, of which there are several which tip the scales in the appellant's favour, the Province of Ontario should be preferred to the State of New York, where there was only a transfer office and nothing else. The situs is in Ontario, where the shares could be dealt with effectively; where the corporate existence of the company depends on Ontario and Canadian Law; where the shareholders and the company receive the protection of Ontario and Canadian law; where the head office of the company is situate, and where winding-up proceedings would take place. The shares in question are property situate in Ontario and are exigible for duty under the Succession Duty Act, 1939.

John Jennings K.C. (of the Canadian Bar) for the respondents. The transfer agents in Ontario and New York had equal status. The shares in question were not, and are not, property situate within Ontario: *Re MacFarlane* (1); *Rex v. Williams* (2); *The King v. The Globe Indemnity Company of Canada* (3), which last is in substance the judgment in the present case. Domicile of the deceased could never by itself be a determining factor on the question of situs, and domicile and the maxim " *mobilia sequuntur personam* " are only to be taken into account and given such weight as may be fairly credited to them to tip the balance. So far as the record goes, the respondents have no association with Canada, and when it is observed that if they had come into the Province of Ontario to effect transfer they would have rendered themselves liable to two succession duties—Dominion and Ontario—can it be supposed that any businesslike people would have taken such a course and would have subjected the estate to two new taxes? That is a strong reason why the situs should be held to be in that country where the testator was domiciled and resident, where the share certificates were, and where the shares could be effectively dealt with—effectively dealt with in the business sense within the meaning in *Rex v. Williams* (2). The executors required no aid from any court or authority in Ontario to effect a transfer into their names or into the names of transferees from the executors: *Rex v. Lovitt* (4). There are the distinctions between the facts in *Rex v. Williams* (2) and the present case that here none of the share certificates

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(1) [1933] O. R. 44, 48.

(3) [1945] O. R. 190.

(2) [1942] A. C. 541.

(4) [1912] A. C. 212, 225.

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were endorsed in blank or otherwise at the time of the death of the testator, and the testator did not reside in that State of the U.S.A. in which there were agents authorized to transfer the shares in question. The respondents could effectually deal with the shares without coming into Ontario, and could not be compelled to part with them to enable the transfers to be effected in Ontario; in a business sense, the shares at the date of death could have been effectually dealt with in the State of New York, which was the natural place for their transfer.

C. R. Magone K.C. replied.

October 10. The judgment of their Lordships was delivered by LORD UTHWATT. These appeals from the Court of Appeal for Ontario relate to the question of the situs to be attributed to registered shares in companies for the purposes of the Succession Duty Acts of Ontario. They may be conveniently dealt with together. [His Lordship then stated the facts set out above, and continued:] The authorities which bear on the situs of registered shares were recently reviewed by their Lordships in *Rex v. Williams* (1), and it is unnecessary again to review them. It is now settled beyond dispute that for the purpose of death duties a local situation is to be attributed to shares in a company and that (leaving aside the case of "street certificates") the first matter to be ascertained in an inquiry as to the situs of registered shares is the place in which the shares can be effectively dealt with as between the shareholders and the company so that the transferee will become legally entitled to all the rights of a member. The authorities before *Rex v. Williams* (1) establish that, if such a place be found within a particular jurisdiction, the shares are situate within that jurisdiction, but in none of those cases was there present the feature that there were two places where the shares could effectively be dealt with, one within and the other outside the jurisdiction. That situation arose in *Rex v. Williams* (1), where shares could be transferred indifferently in Toronto, Ontario and in Buffalo, New York. The principle laid down and applied in that case was if it were possible on rational grounds to prefer one of the alternative places to the other as the place of transfer for the shares in question, the selection should be made accordingly.

A just estimation is, in their Lordships' opinion, first to be

(1) [1942] A. C. 541.

made of all matters which relate to the transfer of the shares under consideration. If sufficient reason for a choice of one place then appears, the problem is solved. It is only where a solution on these lines is not possible that the need for resort to some other principle for determining situs arises.

The adoption of place of transfer as the leading consideration in determining locality involves, in their Lordships' view, the corollary that, if there be, outside the jurisdiction in which it is suggested the shares are situate, several places where transfers can be effectively carried through in the ordinary course of business, and there is no place within the jurisdiction where a transfer can be carried through, the shares cannot be situate within the jurisdiction. The inquiry at the outset is "Are the shares situate in the jurisdiction or not?" The inability of the jurisdiction to satisfy the test removes it from the arena. The circumstance that alternative places of transfer exist in what happen to be two different states outside the jurisdiction is for the purpose in hand no more relevant than the circumstance that two places of transfer exist in one state outside the jurisdiction.

These considerations are sufficient to dispose of *Blonde's* case. It is clear that the shares could be transferred outside Ontario in the ordinary course of business and could not be transferred within Ontario at all. The shares were therefore not situate in Ontario. The domicile of the testator, grant of probate in Ontario and the presence in Ontario of the share certificates, are irrelevant.

Aberdeen's case cannot be disposed of so summarily. Effective transfers were possible both in Ontario and outside Ontario. The other matters bearing on transfer must therefore be considered. In argument two matters were referred to as helping the view that the shares were situate in Ontario. First, it was said that under the law of New York, the shares were not situate in New York. The field was therefore left open for Ontario, and the absence of a competitor, if not conclusive in favour of Ontario as the situs of the shares, at least tipped the scale in its favour. In their Lordships' opinion the view taken by the law of New York as to the situs of the shares is irrelevant. The question at issue is what is the situs according to the law of Ontario, and on that topic the law of New York has no bearing. A situs in New York according to the law of Ontario is consistent with the absence of that situs according to the law of New York. It may be

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added that it was not suggested that the lack, according to the law of New York, of situs in New York in any way impeded operations on the register of transfers maintained in New York. Secondly, it was suggested, in the case of the shares in the Nipissing Company, that as the Ontario Companies Act required a register of members to be kept in Ontario and the maintenance of a register of members and a transfer office in New York was facultative, primacy should be accorded to the Ontario office. In their Lordships' opinion there is no substance in this point. The New York transfer office was no fleeting phantom and, as regards its functions, it stood in all respects on a parity with the Ontario transfer office.

The other features that bear on transfer are that the shares were freely marketable both in New York and in Ontario ; that the registered owners were domiciled and resident in Massachussets ; that the share certificates were in Massachussets ; that probate in Ontario was not necessary in order to enable Aberdein's executors to be registered on the New York register, and that there were clear advantages to executors in choosing New York rather than Ontario as the place of transfer (see *Rex v. Globe Indemnity Company of Canada, Ltd.* (1)). The common feature of these matters is that none of them points to Ontario, and all point to New York, as the place at which in the ordinary course of affairs the shares would be dealt with by the registered owner. That owner, domiciled and living in Massachussets and with alternative markets open to him, would be little likely when desiring to deal with his shares to choose a market and place of transfer which subjected him to the necessity of transferring the share certificates to a place outside the U.S.A. and of receiving Canadian dollars on a sale. On transmission on death both as regards shares held jointly as well as the shares held by Aberdein solely, New York and not Ontario would in the ordinary course be selected as the place for completing the formalities incident to the new ownership. In substance for transfer purposes New York occupied the field so far as these shares were concerned. Without leaving the region of transfer there is, in their Lordships' view, sufficient ground here (though there is not present, as in *Rex v. Williams* (2), any blank endorsement of the certificate) to enable a selection to be made between New York and Ontario. In their Lord-

(1) [1945] O. R. 190. (2) [1942] A. C. 541.

ships' view the shares were not, according to the law of Ontario, situate in Ontario.

Their Lordships will humbly advise His Majesty that the appeals in both cases should be dismissed. The appellant in each case will pay the costs of the appeal.

Solicitors for appellant in both appeals: *Blake & Redden.*

Solicitors for respondents in first appeal: *Lawrence Jones & Co.*

Solicitors for respondents in second appeal: *Charles Russell & Co.*

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ATTORNEY-GENERAL FOR CANADA . APPELLANT ;

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Oct. 23.

ATTORNEY-GENERAL FOR THE PRO-
VINCE OF QUEBEC RESPONDENT.

[AND CONNECTED APPEAL.]

ATTORNEYS-GENERAL FOR SASKAT-
CHEWAN, ALBERTA AND MANI-
TOBA INTERVENERS.ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE
PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Bank deposits—Not operated for thirty years—Deemed bona vacantia by provincial legislation—Constitutional validity—Ultra vires—"Banking"—An Act Respecting Certain Vacant Property Without an Owner, 1939 (Geo. 6, c. 28) (Quebec), s. 1—British North America Act, 1867 (30 & 31 Vict., c. 3), s. 91 (15) ; s. 92 (13).

Section 1 of c. 28 of the Statutes of Quebec, 1939, which provides that whenever "deposits of money and of securities and all credits "in specie or in securities in credit institutions and all "other establishments which receive funds or securities on "deposit " have not been for thirty years or more the subject of any operation or claim by the persons entitled thereto, they, with the fruits thereof, are to be deemed to be vacant property and without an owner, belonging to His Majesty in right of the province,

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and SIR LYMAN POORE DUFF.

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was aimed primarily at certain deposits in banks in Quebec, and was ultra vires the provincial legislature as in pith and substance relating to "banking," a subject-matter within the exclusive legislative competence of the Dominion Parliament under head 15 of s. 91 of the British North America Act, 1867.

Provincial Treasurer of Manitoba v. Minister of Finance for Canada [1943] S. C. R. (Can.) 370, referred to.

Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) [1943] K. B. (Quebec) 543, reversed.

CONSOLIDATED APPEALS (No. 43 of 1944) from a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) (June 29, 1943), which affirmed a judgment of the Superior Court of the Province (Demers J.) (October 6, 1941), which held the Quebec Statute entitled "An Act Respecting 'Certain Vacant Property Without an Owner'" (3 Geo. 6, (1939) ch. 28) to be within the powers of the legislature of Quebec to enact and to apply to the Bank of Montreal. The Court of King's Bench consisted of Létourneau C.J., St. Germain, Walsh, Francœur and Marchand JJ., Marchand J. dissenting.

The material clause in the Quebec Statute which came into force on April 28, 1939, ran as follows:—"The following are "deemed to be vacant property and without an owner, belonging to His Majesty in the rights of the province of Quebec, "deposits of money and of securities and all credits in specie or "in securities, with the fruits thereof, in credit institutions and "all other establishments which receive funds or securities on "deposit, whenever, for thirty years or more, such deposits "or credits have not been the subject of any operation or "claim by the persons entitled thereto."

The following facts are taken from the judgment of the Judicial Committee: In November, 1940, the Attorney-General for Quebec instituted proceedings in the Superior Court alleging that the Bank of Montreal was a "credit institution" within the meaning of the Act and that it held deposits of money, etc., made by certain depositors as set out in an attached list, which deposits had not been the subject of any operation or claim by the persons entitled thereto for thirty years or more. The declaration claimed that, in virtue of the Quebec statute, those deposits were deemed to be "vacant property and without an "owner," and the Attorney-General for Quebec accordingly claimed that the defendant bank should pay over the total of those deposits to him, together with the total of certain other

deposits in the Molson's Bank, which were similarly left untouched by their owners for more than thirty years and which had been taken over by the Bank of Montreal when it absorbed Molson's Bank.

To that declaration the Bank of Montreal pleaded that it was not a "credit institution," so that the Act did not apply to it at all, and it also pleaded that the funds it had received from depositors were not "deposits" within the meaning of the Act. Apart from those special points, the bank raised the broad contention that the Act was beyond the powers of the Quebec legislature to pass, as "banking" was one of the subjects allotted exclusively to the Parliament of Canada, and, moreover, that the Bank Act of the Dominion, 1934 (24-25 Geo. 5, ch. 24) contained provisions with which the statute of Quebec was in conflict. On this last issue of the validity of the Quebec statute of 1939, the Attorney-General for Canada at once intervened to support the view that the Act of the Quebec legislature was beyond its powers and void, at any rate in respect to banks, and on this appeal arguments were heard on his behalf, as well as on behalf of the Bank of Montreal, in support of the appeal. On the other side the Attorney-General for Quebec was supported by counsel acting for the Attorneys-General for Saskatchewan, Alberta and Manitoba.

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1946. July 10, 11, 15, 16. *H. E. O'Donnell K.C.* and *W. R. Jackett* (both of the Canadian Bar) for the appellant the Attorney-General for Canada. The impugned Act is ultra vires as being directed to "banking," which, under head 15 of s. 91 of the British North America Act, 1867, is within the exclusive legislative competence of the Dominion Parliament. The Quebec statute strikes at the very heart and core of banking, as used in s. 91—the deposit contract and the rights and obligations flowing therefrom being a most essential part of banking. Moreover, the Quebec Act clashes with provisions of the Bank Act of the Dominion (24 & 25 Geo. 5, c. 24), which is legislation validly adopted under the provisions of s. 91 of the Constitution Act, and the federal enactment must prevail. The statute complained of extinguishes the liability of the bank to the depositor, contrary to the federal Act, which preserves that liability as long as the bank operates. Secondly, the Quebec statute provides in the circumstances therein set out for the confiscation of the depositor's rights and declares the deposits to be deemed to be vacant property without an

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owner belonging to the Crown in right of the province. Thirdly, it imposes a liability on the bank with respect to the deposit in favour of the Crown in right of the province. The effect, virtually, is that it abolishes the depositor's contract with the bank and the bank's debt to the customer. [Reference was made to *Tennant v. Union Bank of Canada* (1).] The position as to conflicts between ss. 91 and 92 of the British North America Act has been recently set out in *Attorney-General for Alberta v. Attorney-General for Canada* (2), which is very apposite. Admittedly the operation of banking might be regarded as "property and civil rights"—within the exclusive legislative jurisdiction of the province under head 13 of s. 92 of the Act of 1867—but inasmuch as it is a part of property and civil rights which is specifically referred to in head 15 of s. 91, that must of necessity remove it from the ambit of the jurisdiction of the province. For the province to succeed, it must show that its legislation in this respect overrides the Dominion's legislation on banking. In pith and substance this impugned provincial Act, which is invoked to justify taking money from the bank, is not anything other than banking when it is examined in the light of the rules of interpretation stated by this Board: *Attorney-General for Canada v. Attorney-General for British Columbia* (3) and *Attorney-General for Alberta v. Attorney-General for Canada* (4). It is not, in effect, property and civil rights, but an attempt to get at the bank account; further, the Dominion has already legislated in respect of this very matter. *Bank of Toronto v. Lambe* (5) had nothing to do with the right of the province to go into banking as such.

It is submitted that Létourneau C.J. in his judgment in the present case misdirected himself as to the effect of *Provincial Treasurer of Manitoba v. Minister of Finance for Canada* (6). The alleged analogy which he found between that case and this did not exist; also there was there no question of the constitutionality of any enactment; the provincial Act did not conflict with anything, and nobody said that it did; a further aspect is that the two companies in that case were not banks. From the point of view of the depositor the present matter resolves itself into a question of prescription: the Quebec Act says thirty years, the Dominion Bank Act says no prescription. The province cannot enact a law which is one of

(1) [1894] A. C. 31, 46.

(2) [1943] A. C. 356, 369-70.

(3) [1930] A. C. 111, 118.

(4) [1939] A. C. 117, 129, 133.

(5) (1887) 12 App. Cas. 575.

(6) [1943] S. C. R. (Can.) 370.

prescription which would lead to a conflict with s. 92, sub-s. 2, of the Bank Act. The impugned Act is clearly colourable. The policy of the Dominion is that depositors are encouraged to leave their money with Dominion chartered banks with the full assurance that it is always available and fully protected. The law in Canada governing the relation between the banker and the depositor is virtually to the same effect as in *Foley v. Hill* (1) : Quebec Civil Code, arts. 1762, 1777, 1782, 1778, 1779, dealing with irregular deposits. The impugned Act is directed principally and virtually against bank accounts, and it and the Bank Act cannot possibly go along side by side.

L. A. Forsyth K.C. and *C. P. H. Carson K.C.* (both of the Canadian Bar) for the appellant the Bank of Montreal, adopted the argument for the Attorney-General for Canada—that the subject-matter of the Quebec Act is in pith and substance “banking”; that if it is not, then it is legislation with respect to a matter which is ancillary to banking, and the Dominion Parliament having legislated, its legislation must therefore override the provincial Act. On the further point—that the language used in the Act is not apt to apply to a bank or to an irregular deposit—it is submitted that the Bank of Montreal is not properly or legally described as an institution of credit, but should be described as a bank, which is the name attributed to it by its charter. The Bank of Montreal would not come under the phrase “other establishments which receive funds or “securities on deposit”; the word “deposit” in that context necessarily means a *real* deposit, i.e., the contract described in arts. 1794 to 1829 of the Civil Code in which the depositary has no right to use the thing deposited and must return to the depositor identically the same thing as was deposited, because it qualifies both “funds” and “securities” and must therefore have the same meaning in relation to both. Since only a *real* deposit can exist in respect of securities, it follows that the word “deposit” has a like meaning in respect of funds. It is not the usual function of a chartered bank to accept funds on such a basis, and it is therefore an improper description of a chartered bank to term it an establishment which receives deposits of this kind. The statute is derived from French law which will be found in the *Journal Officiel* of June 26, 1920. The French law specifically mentions banks, the Quebec statute does not. This omission is significant. The addition in the French version of

(1) (1848) 2 H. L. Cas. 28, 36, 43.

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the Quebec Act of the word " titres " after " sommes d'argent " furthermore makes untenable the contention advanced by the province to the effect that the statute applies both to regular and so-called " irregular " deposits.

L. Emery Beaulieu K.C. (of the Canadian Bar) and *Gahan* for the respondent the Attorney-General for Quebec. The impugned Act is not one solely directed against banks ; it is an Act of general application, and there are several other institutions in Quebec which also receive deposits of money and specie. On the main point, the real nature of the enactment must be looked at, and it is submitted that according to its true nature and character the impugned Act is one relating to " property and civil rights " and not to " banking," and, further, that there is no conflict between the Act and the Dominion Bank Act : *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1) ; *Citizens Insurance Company of Canada v. Parsons* (2). If the words " property and civil rights " are used in their widest sense they undoubtedly include the law of succession, and of devolution and transmission of vacant estate, and they would also include ownership of things, even ownership of bona vacantia. That is fundamental to the submission that it is within property and civil rights. Before confederation vacant estate and vacant property fell to the Crown under the law of Quebec, and before confederation the validity of this Act would never have been challenged. The enactment under discussion is not substantially different from the general law of the province, the general principle being that bona vacantia belong to the Crown : art. 401 of the Civil Code, which has been supplemented by art. 636. It would not, of course, be competent for the province under the guise of amending its law relating to vacant property to invade the federal field by a false definition, and by an enactment which would be totally outside the scope and extent of what is generally known as succession. In the present case, however, the provincial Act is purely and simply an amendment to the general law of vacant property, and an amendment relating simply and solely to a question of evidence as to how should be established the facts which are required to constitute the vacant property. What has been done is merely to apply to deposits in banks a rule of evidence which is perfectly normal and well-known, called presumption. The law has inferred the consequence that the depositor died, and died

(1) [1892] A. C. 437, 442. (2) (1881) 7 App. Cas. 96, 109.

leaving a vacant property—that is a presumption. So there is now in virtue of that legal presumption the same position as if there was full evidence of witnesses or documents to the effect that this depositor whose deposits are claimed had left a vacant property. The fact is established as it would have been established by any other kind of evidence. As soon as there is a judgment of the court the presumption has become absolute, and the property belongs to the province. The case under the general law of Quebec and under the impugned Act is only a difference of evidence. Some of these deposits have been dormant for over a hundred years ; there must be some limit—it is against public policy that property should remain without an owner. Next, that presumption of thirty years is in conformity with the whole trend of Quebec legislation, under which every right is lost by thirty years of inactivity. The bank can never become the owner of these deposits, somebody must, and it is enacted that after thirty years that somebody will be the province.

Summing-up, this is nothing but a statutory modification of the general law of vacant property, and it is competent for the province to regulate the conditions under which certain kinds of property will be deemed to be vacant property. Létourneau C.J. said in effect that possession and ownership are different things, and that change of ownership is not a change relating to banking ; it relates to property and civil rights : *Provincial Treasurer of Manitoba v. Minister of Finance for Canada* (1). The fact that the Act deals with a particular kind of deposit is not sufficient to make the Act incompetent. Deposits are essentially a part of banking operations, and the Act affects deposits, but the Act is not necessarily a banking Act for the sole reason that it affects bank deposits : [reference was made to a number of Acts affecting bank deposits which, he submitted, could not nevertheless be considered as laws relating to banking]. *Bank of Toronto v. Lambe* (2) held that banks themselves were subject to taxation by the province. [Reference was also made to *Citizens Insurance Company of Canada v. Parsons* (3) and *Attorney-General for Ontario v. Reciprocal Insurers* (4).] Transfer of ownership of the deposit itself, whether it be a bank deposit or one in any other credit institution, is governed by the law of the province of Quebec, and whether the transfer is made by an act of the depositor or

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(1) [1943] S. C. R. (Can.) 370, 380.

(3) (1881) 7 App. Cas. 96, 109.

(2) 12 App. Cas. 575.

(4) [1924] A. C. 328, 345.

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by operation of the law makes no difference. There is no transfer of ownership in the deposit which is governed by the federal law, consequently, what relates to transfer of ownership is within provincial competency even if the object is a bank deposit. The change of ownership does not affect the operation of banking.

Lastly, there is no conflict between the impugned Act and the Bank Act because they do not cover the same field. The provincial Act relates to ownership purely and simply; the Bank Act contains no provision relating to ownership of the deposit. Consequently, the field is open, and the provincial Act is a supplement to the federal Act inasmuch as it puts an end to the awkward situation of moneys being kept indefinitely without an owner. If it is property and civil rights, and if the Crown is a lawful claimant, payment to the Crown would discharge the bank. In *State of Oregon v. First National Bank of Portland* (1) it was said that "the right of the state to escheat" and hold the property of absentee depositors is as ample and "rests upon as sound reasons of public policy as its right to "escheat the property of persons who have died, leaving no "known heirs" (2); that is cited in aid. The enjoyment of unclaimed deposits in a bank is not in the regular business of the bank.

Gahan followed, and, also on behalf of the Attorneys-General for Manitoba, Saskatchewan and Alberta, interveners, whom he represented, adopted in its entirety the argument for the Attorney-General for Quebec. He referred to *McGregor v. Esquimalt and Nanaimo Ry.* (3) in relation to the power of the province to confiscate property.

H. E. O'Donnell K.C. replied.

OCT. 23. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above, and continued: It is convenient firstly to deal with the special contentions advanced by the Bank of Montreal as to the true interpretation of the Quebec statute, leaving until later the examination of the constitutional issue. None of the judges who have dealt with this case in Canada accepted the contention that the Quebec statute did not apply to banks in general, and to the Bank of Montreal in particular. On the contrary, Demers J. expressed the suspicion that the draftsman of the

(1) (1912) 61 Oregon 551.

(2) Ibid. 554.

(3) [1907] A. C. 462, 468.

Act, while using the phrase : " credit institutions and all other " establishments which receive funds or securities on deposit," deliberately avoided the use of the word " bank " because the presence of this word would provoke a constitutional challenge. Be this as it may, their Lordships agree with the view unanimously taken in the Canadian courts that the statute is aimed at certain deposits in banks in Quebec. Neither can the bank's other special contention prevail, namely, that the only deposits referred to are so-called " regular " deposits, where the identical thing that is entrusted to the bank must be returned, which is the contract of commodatum in Roman law. It is clear from the language of the section that what are called " irregular " deposits, where the bank is not bound to return the identical coins, but to repay the amount of the loan (the contract of mutuum in Roman law) are also included.

The real issue that is left is the constitutional question, and this may be raised in two ways. (a) Does the exclusive power of the Parliament of Canada to legislate in the matter of " banking " (head 15 of the enumerated classes of subjects in s. 91 of the British North America Act) in itself establish the invalidity of a Provincial law dealing with bank deposits which for thirty years have not been the subject of any operation or claim by the persons entitled thereto ? (b) Even if this is not so, do the provisions of the Dominion Bank Act on which the appellants rely, stand in conflict with the Quebec legislation so that the latter is invalid in so far as it conflicts with the former ?

If the true subject-matter of the Quebec statute is " banking " it is ultra vires the Provincial legislature : if its provisions conflict with the Federal Act, the Federal Act must prevail. An answer therefore to either question in favour of the Dominion is sufficient to invalidate its provisions. Their Lordships propose accordingly to consider the earlier and more general question first. So long ago as 1894 the Board, through the mouth of Lord Watson, in *Tennant v. Union Bank of Canada* (1), pointed out that by s. 91 of the British North America Act, notwithstanding anything contained in the Act, the exclusive legislative authority of the Parliament of Canada extended to all matters coming within the enumerated classes, and went on to declare that some, at any rate, of those classes could not be operated without interfering with and modifying some of the ordinary rights of property, that one of those classes was " banking," and that that expression is wide enough to

(1) [1894] A. C. 31, 47.

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embrace every transaction coming within the legitimate business of a banker. "These" (i.e., the legislative powers of the Parliament of Canada), he adds, "depend on s. 91, and the "power to legislate conferred by that clause may be fully "exercised, although with the effect of modifying civil rights "in the Province." The matter which their Lordships have to determine is accordingly whether the transaction of receiving from depositors bank deposits and repaying those deposits to the depositors comes within the legitimate business of a banker. Prima facie it does, and the respondents admit that the receiving and payment of deposits comes within that category, but, they say, this function need not necessarily include payment out to the person who made the deposits or to his order; the question to whom they are to be paid is a matter of property and civil rights in the province. In their contention the Province, under this heading in s. 92, can regulate the transmission of property without interfering with the business of banking, and in doing so no more trenches on the field of banking than the general law does in regulating the transmission of property on death or its seizure in execution. The Bank, they say, must repay the money to a legal claimant, but the Province can determine who that legal claimant shall be: the Bank is concerned with the possession of the deposits not with their property, and prescription is a function of the Province which can determine when money becomes bona vacantia and passes to it as such. A transfer of property, they maintain, is incidental to property and civil rights and not to banking: the ownership of deposits is no concern of the bank. They support this contention by pointing out that within its own field the provincial legislature is not subordinate to the Dominion Parliament, but "continues to be free from "the control of the Dominion, and as supreme as it was before "the passing of the [British North America] Act"; (see *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1)), and by citing such cases as *Bank of Toronto v. Lambe* (2) and *Attorney-General for Ontario v. Attorney-General for Canada* (3). It does not appear to their Lordships that much assistance in elucidating the contentions of the parties in the matter now in dispute is to be obtained from the principles laid down in these cases. The former has been explained in *Attorney-General for Alberta v. Attorney-*

(1) [1892] A. C. 437, 442.

(3) [1894] A. C. 189.

(2) (1887) 12 App. Cas. 575.

General for Canada (1), where it is pointed out that no suggestion of encroachment on the field of banking arose in *Lambe's* case (2), in which nothing was sanctioned other than a legitimate attempt to raise revenue for Provincial needs, and that many other interests besides banking were affected. In the latter an Act which gave assignments purely voluntary for the general benefit of creditors precedence over all judgments and executions not completely executed by payment, was held valid because, as no compulsion to make such assignments was imposed, the field of bankruptcy was not touched on, and in any case the provisions of the Act were merely ancillary to bankruptcy and insolvency.

Nevertheless, an answer is still required to the question, what is the pith and substance of this Act, the validity of which is challenged. No doubt in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in s. 91 it is under the terms of that section not to be deemed to come within the classes of subjects assigned exclusively to the legislatures of the Provinces, even though the classes of subjects looked at singly overlap in many respects. The whole scheme for distribution of powers must be looked at, as their Lordships pointed out in *Attorney-General for Alberta v. Attorney-General for Canada* (3). Moreover, as their Lordships laid down in *Attorney-General for Canada v. Attorney-General for British Columbia* (4), it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in s. 91. "Legislation," says Lord Maugham in delivering the judgment of the Board in *Attorney-General for Alberta v. Attorney-General for Canada* (5), "coming in pith" and substance within one of the classes specially enumerated "in s. 91 is beyond the legislative competence of the Provincial legislatures under s. 92." In calling attention to these principles their Lordships are but repeating what has many times been set forth in judgments of the Board, and it only remains to apply them to the individual case under consideration.

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(1) [1939] A. C. 117, 133.

(4) [1930] A. C. 111, 118.

(2) (1887) 12 App. Cas. 575.

(5) [1943] A. C. 356, 370.

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Is then, the repayment of deposits to depositors or their successors in title under the law as existing a part of the business of banking or necessarily incidental thereto, or is it concerned primarily with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking. The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley v. Hill* (1) as "the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to "honour the customer's drafts." No question of possession of or property in the deposit arises. The obligation is mutuum not commodatum. Once the deposit is made there remains only a debt due from the banker to the customer. It is urged, however, on behalf of the respondents that the legislation is not aimed at banks. It is, they say, of general application and affects not banks only but credit institutions of all kinds. The Chief Justice of Quebec has pointed out in answer, and St. Germain J. appears to agree with him, that it is directed only at the banks because in every other case these deposits had already become the property of the depositors by prescription. In so stating he no doubt had in mind s. 92 of the Bank Act of the Dominion (24 & 25 Geo. 5, c. 24) and the fact that apart from those made by banks most loans are repayable at a fixed or indefinite time and not, as in the case of advances by banks, repayable on demand, so that, even if in some cases it may apply to other institutions, in the vast majority of cases, and primarily, the legislation now in question affects banks and them alone.

If that be the main object and effect of the Provincial Act it does, in their Lordships' view, invade the field of banking. It comes in pith and substance within that class, and the fact that it may incidentally affect certain other institutions cannot take away its primary object and effect. Indeed, the Chief Justice would himself have decided in favour of the appellants had he not felt himself constrained by the reasoning of the Supreme Court of Canada in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada* (2) to hold otherwise. That case decided that certain trust money in the hands of a trustee which had not been, and some of which could not be, distributed

(1) (1848) 2 H. L. Cas. 28.

(2) [1943] S. C. R. (Can.) 370.

to the *cestuis que trustent* could not be regarded as *bona vacantia*, but that it passed to the Province under an Act which provided that : " 2. All personal property, including money or securities for money deposited with or held in trust by any person in the province, which remains unclaimed by the person entitled thereto for twelve years from the time when such property, money or securities were first payable shall notwithstanding that the deposittee or trustee has delivered or paid or transferred such personal property, money or securities to any other person or official within or without the province as deposittee or trustee vest in and be payable to His Majesty in the right of the province of Manitoba subject only to His Majesty's pleasure with respect to any claim thereafter made by any person claiming to be entitled to such property, money or securities." The only question in that case material to that which their Lordships are now considering was whether the special Act was in conflict with ss. 139 and 140 of the Winding-up Act of the Dominion Parliament or trenched on the field of bankruptcy and insolvency. It was held that the special Act was not invalidated for either reason. The money in question was not simply a debt—it was trust money—a fund secured on immovable property, and was not an asset of the liquidator in the winding-up but held as trustee for the individual depositors. There was no reason therefore why the Province should not transfer the possession, which the court held to be all that passed, to the Attorney-General for Manitoba as trustee for the depositors, or, indeed, for that matter, to him as *bona vacantia*. Winding-up and insolvency were not interfered with—only property and civil rights : the sum in dispute being trust money could not be used by the liquidator in the winding-up. Hudson J., however, in delivering the judgment of the court, does say (1) : " the provisions of the Winding-up Act do not deal with ownership but only with the immediate possession of the funds, leaving the matter of ownership to be established later " and the learned Chief Justice in the appeal in the present case thought that an analogy might be drawn between money deposited with a bank and the trust fund, the right to which was litigated in this case in the Supreme Court.

As their Lordships have observed, however, money deposited with a bank is not trust money which the trustee must preserve and not use ; on the contrary, it is lent for use, and the bank is not a trustee but a debtor to the depositor. The difference

(1) [1943] S. C. R. (Can.) 381.

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between property and possession of deposits does not come in question; the only obligation under which the bank lies is to repay a like sum in the like currency. Their Lordships, rejecting as they do the suggested analogy between the two cases, take the same view and reach the result at which the learned Chief Justice would have arrived if he had not regarded the decision in the Supreme Court as one which he ought to follow. In their view, a Provincial legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking.

Having regard to their view on the first point it is not necessary for their Lordships to express any opinion on the second. They will humbly advise His Majesty that the appeal should be allowed and the action dismissed, and that the respondents should pay the costs of the appellants the Bank of Montreal of the hearing before the Board and in both courts in Canada.

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Bank of Montreal: *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Quebec and for the interveners: *Blake & Redden.*

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[PRIVY COUNCIL.]

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Oct. 24.

CANADA AND DOMINION SUGAR
COMPANY, LIMITED APPELLANTS;
AND
CANADIAN NATIONAL (WEST INDIES)
STEAMSHIPS, LIMITED RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada — Shipping — Bill of lading — Cargo of sugar — "Received
" in apparent good order and condition " — Bill endorsed "signed under
" guarantee to produce ship's clean receipt " — Qualification — Estoppel*

* Present: LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT,
LORD PORTER and LORD UTHWATT.

—*Carriage of Goods by Sea Act, Rev. St. of British Guiana, 1930, c. 123, scheduled rules, art. III., rr. 3, 4—Construction.*

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A "received for shipment" bill of lading in respect of a quantity of sugar shipped on the respondents' steamship stated that the sugar was "received in apparent good order and condition," but contained on the margin a stamped endorsement "signed under 'guarantee to produce ship's clean receipt.'" The sugar, which had been lying for some time at the wharf, had suffered some damage before shipment, and the ship's receipt stated "many bags stained, 'torn and resewn.'" The sugar having been delivered in a damaged condition the appellants, as indorsees of the bill of lading, alleged, inter alia, that the respondents were estopped from saying that it was shipped in other than "apparent good order and condition," and they claimed a declaration of liability and a reference to assess the damages :—

Held, that a question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities, and the whole case of estoppel fails if the statement on which the alleged estoppel is founded is not sufficiently clear and unqualified. On that basis the language of the bill of lading, read fairly and as a whole, was not such as to found an estoppel, the statement as to apparent good order and condition being qualified. Accordingly, there being no ground for holding the respondents guilty of any breach of contract or duty in regard to the carriage of the sugar, and, indeed no reason to find that it was actually damaged on the voyage, the claim failed.

Nature of estoppel considered.

Silver v. Ocean Steamship Company [1930] 1 K. B. 416, and dicta of Bowen L. J. in *Low v. Bouverie* [1891] 3 Ch. 82, at p. 106, referred to.

Rule 3 of art. III. of the rules scheduled to the Carriage of Goods by Sea Ordinance of British Guiana, 1930, which requires that "after receiving the goods into his charge, the carrier, or the "master or agent of the carrier, shall on demand of the shipper, "issue to the shipper a bill of lading showing among other things :— " . . . (c) the apparent order and condition of the goods," expressly applies only if the shipper demands a bill of lading showing the apparent order and condition of the goods. *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277, referred to.

Dictum of Scrutton L. J. in *Silver v. Ocean Steamship Company* [1930] 1 K. B. 416, at p. 425, that r. 4 of art. III. of the rules scheduled to the Carriage of Goods by Sea Ordinance, which provides that "such a bill of lading shall be prima facie evidence "of the receipt by the carrier of the goods as therein described in "accordance with para. 3 (a) (b) and (c)", has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it, not dissented from.

J. C.

Judgment of the Supreme Court of Canada [1945] S. C. R. (Can.)
249, affirmed.

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APPEAL (No. 68 of 1945) from a judgment of the Supreme Court of Canada (February 6, 1945) which reversed a judgment of the judge in Admiralty for the Quebec Admiralty Division of the Exchequer Court of Canada (June 9, 1944).

In the action out of which this appeal arose the appellants, as buyers under a c.i.f. contract and as assignees of the bill of lading, claimed damages for breach of contract of carriage of 1,150 tons—10,350 bags—of Demerara raw cane sugar from Georgetown, British Guiana, to Montreal on the respondents' steamship *Colborne*, which sailed on June 14, 1938. It was stated for the appellants that at the time of loading many of the bags of sugar were wet and stained, and that when the sugar reached Montreal about thirty per cent.—3,105 bags—was wet and damaged. The bill of lading stated that the sugar was "received in apparent good order and condition." In the margin of the bill there were inserted the words "signed under guarantee to produce ship's clean receipt." Clause 27 of the bill of lading provided that "In cases where the clean bills of lading are signed, subject to mate's receipt, consignee and/or consignor to be bound by any notations and/or exceptions on such mate's receipt as though the notations and exceptions had been placed on the bill of lading itself, it being recognized that clean bills of lading have been surrendered before the exceptions (if any) were known, in order to facilitate the business of the shipper or other party directly interested in the goods."

The ship's receipt contained the words "many bags stained, torn and resewn." The appellants claimed, inter alia, that the bill of lading was a "clean" bill, and that the respondents were estopped from saying that the sugar was shipped in other than apparent good order and condition. The respondents contended, inter alia, that the bill was not "clean," being signed "under guarantee to produce ship's clean receipt"; that they were not estopped from proving that the sugar was damaged before shipment, and that they delivered it in the same condition as that in which they had received it.

The trial judge (Cannon J.) held that the appellants were entitled to the damages proceeded for. On appeal, the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Kellock and Estey JJ.), holding that the respondents were

not estopped from showing the true condition of the goods on shipment, reversed the decision of the trial judge and dismissed the action.

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1946. July 24, 25. *Devlin K.C.* and *Colin H. Pearson* for the appellants. It is not disputed that at the beginning of the voyage some of the bags of sugar were noticeably wet, nevertheless in the bill of lading the goods were described as in an "apparent good order and condition." It was a shipment to which the Carriage of Goods by Sea Act, of British Guiana, 1930, applied, and it was agreed between the parties that to all intents and purposes that Act is the same as the Canadian Water Carriage of Goods Act, 1936, which is again substantially the same as the British Act, and there was therefore, under r. 3 of art. III. of the rules scheduled to the Act, an obligation on the ship to issue on demand a bill of lading which would show the apparent good order and condition of the goods. If the bill of lading on its true construction did not show the apparent good order and condition of the goods there was a contravention of the Act. If the matter stopped there, there would, on the authorities in English law, be an estoppel on the ship. The ship having represented that the goods were in apparent good order and condition at the beginning of the shipment, and being estopped from denying that they were not, then it has to account for the fact that they were delivered in a damaged condition, and it cannot, and is therefore in breach. That doctrine of estoppel is well-established: *Silver v. Ocean Steamship Company* (1). In the margin of the bill of lading, however, was a notification "signed under guarantee" "to produce ship's clean receipt," and the ship's receipt, which read "many bags stained, torn and resewn," was not clean. That is what has given rise to the main controversy in this case. There were two other points: first, that the sugar was also damaged during the voyage—that point is not taken now. The other point, on which reliance is still placed, was a complaint of bad stowage; that, granted that the bags were in bad condition on shipment, no attempt was made either to reject wet bags or to separate them, with the result, it is submitted, that the cargo was still further damaged.

With regard to the main point—estoppel—the only purpose for which the respondents rely on the notification is as qualifying the representation in the bill of lading. On the

(1) [1930] 1 K. B. 416.

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true construction of the bill of lading the statement as to good order and condition was not qualified. Once there is a statement in a bill of lading that goods were shipped in apparent good order and condition the business world is going to act on it, and if it is to be qualified it must be so in clear and unambiguous terms: *Silver v. Ocean Steamship Company* (1); *Martineaus (Limited) v. Royal Mail Steam Packet Co.* (2); *Evans v. James Webster and Bros., Ltd.* (3) and *The Skarph* (4). The whole attitude of the courts, having regard to the importance of these words, has been to construe them very strictly against attempts made to cut them down. It is the duty of the shipowner when he knows the goods are damaged to use such words as will bring that fact to the notice of anyone with whom he is dealing, and not to use words which obscure the truth of the words. On the true construction of the bill of lading, and having regard to the facts that the loading was completed and the ship's receipt was issued and the condition of the goods was known to the respondents before the bill of lading was issued by them, neither the words in the margin of the bill, nor cl. 27 thereof are applicable. Nothing in the mate's receipt qualifies the statement in the bill of lading, because the two things are dealing with the goods at different points of time. If the contents of the mate's receipt were intended to affect the description in the bill of lading, then one would expect to find that it was attached to the bill so that the thing could be seen as a whole. In the circumstances the respondents cannot be heard to deny that the goods were received by them in apparent good order and condition.

Lastly, on the question of stowage, contrasting the evidence of a completely independent witness, the Port Warden, and his description of the condition of the cargo on arrival as "a gooey mess," with the condition in the mate's receipt—contemporary written evidence—"stained, torn and resealed," one is bound to come to the conclusion that some further damage was done during the voyage by reason of the stowage.

Willink K.C., *Lionel Côté K.C.* (of the Canadian Bar) and *A. J. Hodgson* for the respondents. The respondents in their defence maintained that the sugar was shipped in a condition which entirely explained its condition on arrival; that the

(1) [1930] 1 K.B. 432-34.

(3) (1928) 34 Com. Cas. 172, 175.

(2) (1912) 17 Com. Cas. 176,

(4) [1935] P. 134, 144.

stowage was not at fault, and that the cargo was inherently liable to arrive in the condition in which it did. The appellants replied that that defence relied on evidence contradicted by the plain statement in the bill of lading, on which they said that they relied when they took up and paid for the documents. The only point now left is what representation of fact was made by the terms of the bill of lading and what representation was made to a reasonably intelligent commercial man taking up c.i.f. documents? The form of the bill of lading and the evidence as to practice show that it is usual in this trade to have the words "shipped in good order and condition" cancelled by reason of a practice or considerations of business convenience. Clause 27 of the bill is illustrative of the circumstances in which the notification was made, and it contemplates the surrender of clean bills of lading before the exceptions were made. The authorities which were cited are really of no assistance on the principle. The question is, what is said by the bill of lading to a reasonably intelligent business man, and many qualifications have been held to be effective to reduce the plain statement: *Evans v. James Webster and Bros., Ltd.* (1). This is not a case of ambiguity, nor is it a case of knowledge aliunde, it is a case where the whole admission is made conditionally, and it is submitted that the condition has not been fulfilled. The bill of lading was not a "clean" bill of lading, and there was no acknowledgment or representation in the bill that the sugar shipped was in apparent good order and condition when received for shipment or when shipped. The respondents are not estopped from saying and proving that the sugar was damaged before shipment.

Devlin K.C. replied.

October 24. The judgment of their Lordships was delivered by LORD WRIGHT. The appellants claimed in the action as holders of a bill of lading in respect of a quantity of sugar shipped at Demerara on the respondents' steamship *Colborne* for delivery at Montreal. In due course the appellants, who had purchased the sugar on c.i.f. terms, took up the bill of lading against payment of 95 per cent. of the purchase price when it was presented to them in accordance with the terms of the contract, and thereupon became owners of the sugar and duly thereafter paid the balance of the price. The sugar

(1) 34 Com. Cas. 172.

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was found to be damaged. In the action it was alleged, in addition to the claim on estoppel, that the damage had been sustained during the voyage and that the respondents as shipowners were liable either for failure to carry with due care or for bad stowage. On the appeal before this Board the primary issue on which the appellants claimed to succeed was on estoppel based on the terms of the bill of lading which, it was contended, contained an unqualified statement that the sugar had been received in apparent good order and condition for shipment on the *Colborne*; the appellants, it was said, accepted the bill of lading on presentation at Montreal and paid for the sugar on the faith of that statement and were entitled to recover accordingly for the resulting loss. The trial judge upheld the claim, but the Supreme Court of Canada dismissed it on the ground that the statement of good order and condition was qualified by the other terms of the bill of lading.

The two further contentions of fact on which the appellants originally relied, namely, want of due care on the voyage and bad stowage, did not succeed either before the judge or before the Supreme Court and need not here be further considered. Their Lordships agree that the contentions failed.

The bill of lading, dated at Georgetown, B.G., on June 13, 1938, and signed by the agents of the shipowners (the respondents) was a "received for shipment" not a "shipped" bill of lading. The loading of the sugar in question was completed on June 13, and the ship's receipt was signed on that date. It is not clearly established whether the signing of the bill of lading was before or after the actual completion of the loading, but as the bill of lading bore on its face an endorsement "Signed under guarantee to produce ship's clean receipt" it would seem reasonable to infer that the ship's receipt had not reached the agents' office when they signed the bill. As will be shown later, this particular point is not material in the final stage of the argument. Evidence was given, and not questioned, that there was a practice at the port to issue bills of lading before the completion of the loading and the issue of the mate's receipt in order to facilitate the shippers' business arrangements by enabling them to catch an earlier mail for the port of destination, so that the document could be presented to the buyer for acceptance and payment before the carrying vessel's arrival. In the present case the *Colborne* did not arrive until July 3, 1938, but the bill of lading was taken up against payment at Montreal on June 29, 1938.

It was not disputed that the sugar, which had been lying for some time at the wharf at Georgetown, had suffered some damage before shipment. From this resulted the damage found on arrival at Montreal. The voyage had been made under favourable weather conditions, and there was nothing to account for the wet condition of part of the cargo except exposure during the rainy season while waiting for shipment. The ship's receipt, signed on June 13, 1938, by the chief tally clerk acting for Booker Bros. McConnell and Co., Ltd., who were the shippers and sellers, and by the same company as agents for the shipowners, had the notation "Many bags stained, "torn and re sewn." This state of things would be sufficient to explain the damage found at Montreal on unloading, though that damage would not involve an inference of bad stowage, as on the evidence the Supreme Court, rightly, in their Lordships judgment, found.

The third point, estoppel, depends primarily on whether the bill of lading contained an unqualified statement that the sugar was received by the ship "in apparent good order and "condition." This issue has been strenuously argued from several different aspects. Mr. Devlin has contended that the statement in the first line of the bill of lading "Received in "apparent good order and condition" governs the whole document: that the stamped clause or endorsement which appears on the margin of the bill, "signed under guarantee to "produce ship's clean receipt," was not sufficiently clear to qualify these governing words which would, at most, merely give rise to an independent claim for breach of the guarantee, should it be broken. Clause 27 was also said to have no application in the facts of the case. Reliance was also placed on certain articles in the Carriage of Goods by Sea Ordinance of British Guiana, Revised Statutes of British Guiana, 1930, c. 123, which it has been agreed is the same as the Canadian Water Carriage of Goods Act, 1936.

The crucial question is what is the true construction of the bill of lading in regard to the matters relevant to this case. The issue is here between the shipowners and the indorsees of the bill, and has to be decided as between these parties on the basis of what appeared on the face of the bill when it was presented at Montreal to the respondents. Their rights and liabilities would not, in a case like this, be affected by what happened at the port of shipment as between the shippers and the shipowners, except in so far as appeared from the bill of

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lading. Authority for that proposition (if authority be needed at this time of day) is afforded by *Evans v. James Webster and Bros., Ltd.* (1), where it was held that an innocent indorsee for value of a bill of lading is entitled to act on the statements contained in the bill of lading unless he has at the material time clear and definite knowledge from other sources that the statements in the bill are untrue. Any other view would affect the value of a bill of lading as a document of title on the faith of which shipowners and indorsees deal. If the statement at the head of the bill, "Received in apparent good order and condition," had stood by itself, the bill would have been a "clean" bill of lading, an expression which means, at least in a context like this, that there was no clause or notation modifying or qualifying the statement as to the condition of the goods. But the bill did in fact on its face contain the qualifying words, "Signed under guarantee to produce ship's clean receipt": that was a stamped clause clear and obvious on the face of the document, and reasonably conveying to any business man that if the ship's receipt was not clean the statement in the bill of lading as to apparent order and condition could not be taken to be unqualified. If the ship's receipt was not clean, the bill of lading would not be a clean bill of lading, with the result that the estoppel which could have been set up by the indorsee as against the shipowner if the bill of lading had been a clean bill of lading, and the necessary conditions of estoppel had been satisfied, could not be relied on. That type of estoppel is of the greatest importance in this common class of commercial transactions; it has been upheld in a long series of authoritative decisions, of which their Lordships need only cite one, *Silver v. Ocean Steamship Company* (2), where the rules applicable to cases in which bills of lading are dealt with as between shipowners and indorsees or other holders for value are laid down. But if the statement is qualified, as in the opinion of their Lordships and the judges of the Supreme Court it was, the estoppel fails.

Mr. Devlin has strenuously contended that this result does not here follow because, he argued, the alleged estoppel here is a clear and unambiguous statement on the face of the bill of lading, which governs the whole document, and its weight is not counterbalanced by the stamped clause, which is not sufficiently precise in negating the effect of the statement and therefore the estoppel is not destroyed by the stamped

(1) 34 Com. Cas. 172.

(2) [1930] 1 K. B. 416.

clause. But the true rule to be followed is that the bill of lading must be construed as a whole, like any other commercial document. In *Low v. Bouverie* (1), Bowen L.J., in deciding against the estoppel there pleaded, said "Now, an estoppel, "that is to say, the language upon which an estoppel is "founded, must be precise and unambiguous" (2). Mr. Devlin argued that conversely to defeat a clear and unambiguous estoppel the language relied on for that purpose must be clear and unambiguous and is not so here. But Bowen L.J. goes on to explain the words he used and to state the true rule:—"That does not necessarily mean that the language must be "such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is "addressed" (2). There was, perhaps, a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. Mr. Devlin has sought to apply the same test to a case where it is sought to qualify words which if unqualified would constitute an estoppel. But in more modern times the law of estoppel has developed and has become recognized as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as "a simple and wholly untechnical conception, "perhaps the most powerful and flexible instrument to be "found in any system of court jurisprudence." How true that description is can be seen by looking at the collection and analysis of decided English cases on estoppel to be found in Halsbury's Laws of England (Hailsham edition), Vol. XIII, pp. 397 to 518. A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities. On that basis the language of the bill of lading, read fairly, and as a whole, is not, for reasons which their Lordships have already here given, such as to found an estoppel. Their Lordships in so deciding are not in any way weakening the rule that a shipowner who issues a clean bill of lading is bound by the statement in it that the goods are shipped in good or in apparent good order and condition: if the statement turns out to be untrue the shipowner is estopped from alleging its falsity as against a purchaser who relies on the statement at its face value and acts on it to his detriment. This is a rule which may be applied any day in the case of c.i.f. contracts. To cast

(1) [1891] 3 Ch. 82.

(2) Ibid. 106.

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doubts on it would be to weaken the whole course of dealing between business men in regard to bills of lading in their character of documents of title used in connexion with overseas shipments of goods. It is true that the unqualified statement is only one step in the establishment of the estoppel. Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted on, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted on it to his detriment, as, for instance, he did in this case when he took up the documents and paid for them. It is also true that he cannot be said to rely on the statement if he knew that it was false: he must reasonably believe it to be true and therefore act on it. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified. That, in their Lordships' judgment, is the position in this case. The appeal must therefore fail, because there is no ground for holding the respondents guilty of any breach of contract or duty in regard to the carriage of the goods and, indeed, no reason to find that the goods were actually damaged on the voyage. The foundations of the whole of the appellants' case is the estoppel which they seek to extract from the language of the bill of lading. That, taken with the general relationship between the parties and the fact that the goods were in fact delivered in a damaged condition, constitutes the alleged cause of action which they seek to establish. The appellants fail to justify their construction of the bill of lading, and accordingly their claim fails.

This way of approaching the issues makes it unnecessary to consider at length the effect of cl. 27 of the bill of lading. That clause, which is somewhat complicated, seems to recognize the practice of the port of issuing bills of lading before the terms of the ship's receipts are known, and stipulates that if the bills of lading are clean (that is, not expressly qualified as to condition) but are signed subject to mates' receipts, the bills of lading are to be read as qualified by any notations or clauses in the mate's receipt as if they had been expressed in

the bill of lading. If there is any discrepancy between this printed clause and the stamped clause in the margin, the latter, on ordinary principles of construction, will prevail. Their Lordships think that the case should be decided on the simple language of the stamped clause, which overrides cl. 27 if there is any relevant difference in their effect, and that in this case, cl. 27 may be disregarded in the result.

It is finally necessary to deal shortly with an objection raised on the construction of art. III. of the Rules scheduled to the Carriage of Goods by Sea Ordinance. Rule 3 of that article requires that after receiving the goods into his charge the carrier or the master or agent of the carrier shall on demand of the shipper issue to the shipper a bill of lading, showing, among other things, (c) the apparent order and condition of the goods. Rule 7 provides that after the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier shall, if the shipper so demands, be a shipped bill of lading. Rule 3 expressly applies only if the shipper demands a bill of lading showing the apparent order and condition of the goods. There is no evidence that the shipper here made any such demand: indeed, no demand of this nature is alleged. The condition of the rule is thus not fulfilled. In *Vita Food Products, Inc. v. Unus Shipping Co.* (1) this Board held that the rules under an Act in similar terms in force in Newfoundland did not make it imperative for the carrier to issue a bill of lading save on demand of the shipper. There is, indeed, no law which prevents goods being carried at sea without any bill of lading at all (*Vita Food Products* case (2)) or makes any particular form of bill of lading obligatory. It seems clear that the bill of lading here was what the parties intended and was in no sense unlawful or void. That point fails. Rule 4 of art. III. of the rules scheduled to the Ordinance was referred to in the majority judgment of the Supreme Court. That rule reads, "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a) (b) and (c)." The rule, however, can have no practical application in this case. The bill of lading, as their Lordships have found, does not describe the goods as being received in apparent good order and condition, and there is no reason under the rules or otherwise for refusing effect to the bill of lading according to its construction. In any case, their Lordships, like the majority

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(1) [1939] A. C. 277.

(2) *Ibid.* 294.

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judges of the Supreme Court, do not see any reason to dissent from the view expressed by Scrutton L.J. in *Silver's* case (1), that r. 4 of art. III. has not the effect of allowing the ship-owner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it. It is enough here to say that the bill of lading in this case does not contain any such statement as that to which Scrutton L.J. refers.

On the whole case their Lordships are of opinion that the appeal should be dismissed. They will humbly so advise His Majesty. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Constant & Constant.*

Solicitors for respondents: *Freshfields.*

(1) [1930] 1 K. B. 416, 425.

J. C.*

[PRIVY COUNCIL.]

1946
 Oct. 10.
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PROVINCE OF BOMBAY APPELLANT;
 AND
 MUNICIPAL CORPORATION OF THE
 CITY OF BOMBAY AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Crown—Whether bound by statute—Principles applicable—City of Bombay Municipal Act (Bom. Act III. of 1888), ss. 222, sub-s. 1; 265.

The Crown is not bound, either expressly or by necessary implication, by s. 222, sub-s. 1, and s. 265 of the City of Bombay Municipal Act, 1888, which in effect give the Municipality power to carry water-mains for the purposes of water supply through, across or under any street and “into, through or under any land “whatsoever within the city.”

The general principle applicable in England in deciding whether the Crown is bound by a statute—that it must be expressly named or be bound “by necessary implication”—applies also to Indian legislation.

* *Present*: LORD MACMILLAN, LORD SIMONDS, LORD DU PARCQ, MR. M. R. JAYAKAR and SIR MADHAVAN NAIR.

To hold that the Crown is bound "by necessary implication" if it can be shown that the legislation cannot operate with reasonable efficiency unless the Crown is bound, is to whittle down the general principle and is unsupported by authority.

The earlier view that whenever a statute is enacted "for the public good" the Crown, though not expressly named, must be held to be bound by its provisions, cannot now be regarded as sound except in a strictly limited sense. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

Attorney-General v. Hancock [1940] 1 K. B. 427, at 435, *Gorton Local Board v. Prison Commissioners* [1904] 2 K. B. 165 (n), at 168, *Hornsey Urban Council v. Hennell* [1902] 2 K. B. 73, and *Cooper v. Hawkins* [1904] 2 K. B. 164, referred to.

Dictum of Lord Dunedin in *Magistrates of Edinburgh v. Lord Advocate* 1912 S. C. 1085, at 1090-91, not followed.

Decree of the High Court I. L. R. [1944] Bom. 95, reversed.

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APPEAL (No. 55 of 1945) from a judgment and decree of a Division Bench of the High Court (July 26, 1943) delivered and passed on a special case stated by agreement between the parties under s. 90 and Ord. 36 of the Code of Civil Procedure, 1908.

The question stated in the special case was "whether the Crown is bound by s. 222, sub-s. 1, and s. 265 of the City of Bombay Municipal Act." Those sections related to certain powers conferred on the municipality in connexion with the city's water supply, and in effect gave the municipality power to carry water-mains for the purposes of water supply through, across or under any street, and into, through or under any land whatsoever in the city.

The High Court (Beaumont C.J. and Rajadhyaksha J.) held that the Crown was bound by the sections in question.

The facts and the terms of the sections appear from the judgment of the Judicial Committee.

1946. July 3, 4, 22. *Tucker K.C.* and *Bagram* for the appellant.

W. W. K. Page K.C. and *Jopling* for the respondents.

Oct. 10. The judgment of their Lordships was delivered by LORD DU PARCQ. By a written agreement, dated March 1, 1943, the parties to this appeal concurred in stating a special case for the opinion of the High Court of Bombay. The question of law for the opinion of the court was:—"Whether the Crown is bound by s. 222, sub-s. 1, and s. 265 of the City

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“ of Bombay Municipal Act.” The High Court (Beaumont C.J. and Rajadhyaksha J.) declared that the Crown was bound by these sections, and, in accordance with the agreement between the parties, made an order as to costs in the respondents’ favour. The present appeal is against this decision.

The City of Bombay Municipal Act, 1888, has twenty-one chapters and 528 sections and covers, as might be expected, a wide field. Chapter X. deals with water-supply. Section 265, which is in this chapter, is as follows: “ The commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water-mains, pipes and ducts within or without the city, as he has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city.” The terms of this section thus necessitate a reference to Chapter IX., which has for its subject “ Drains and Drainage-works,” and contains s. 222, sub-s. 1, which says:—“ The commissioner may carry any municipal drain through, across, or under any street, or any place laid out as or intended for a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city.”

It appears from the special case, and from the correspondence annexed thereto, that the corporation wished to lay a water-main in a road known as Antop Hill Road, for the convenience of residents in the district known as Antop Hill. The case states that “ the land in the locality of Antop Hill is for the most part private land belonging to the Government of Bombay, and the road serving the locality, known as Antop Hill Road, is also a private road belonging to the Government and in charge of the Public Works Department.” The meaning of the expression “ private land belonging to the Government ” is obscure, but the correspondence suggests that the land forms a residential district in which government employees (among others) are housed, and counsel were agreed that for the purposes of this appeal it might be assumed that it had been acquired by the Crown from private owners after the passing of the Municipal Act.

In these circumstances the corporation’s hydraulic engineer sought to obtain permission from the Provincial Government to lay the required water-main along the Antop Hill Road. The

Government was willing to consent, but only subject to four conditions, two of which the corporation regarded as objectionable. The two conditions to which objection was made were (1.) that the corporation should, on twelve months' notice, remove the water-main and restore the land to its original condition, (2). that the corporation should pay in advance a rental of one rupee per annum. Eventually the Commissioner (the second respondent to this appeal), in purported exercise of his powers under ss. 265 and 222, sub-s. 1, gave notice of his intention to carry out the proposed work. There followed the agreement under which the question in issue was submitted to the High Court.

The High Court held, following previous decisions of its own, that the principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England. The parties concurred in accepting this view, and their Lordships regard it as correct. The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, "*Roy n'est lie par ascun statute si il ne soit expressement nosme.*" But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication." If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

In the judgment delivered by the learned Chief Justice, in which Rajadhyaksha J. concurred, the principle "that the Crown is not bound by legislation in which it is not named expressly or by necessary implication" was in terms accepted, but an interpretation was placed on it which their Lordships are unable to approve. After stating the principle in the words just quoted, the learned Chief Justice went on to say that if it can be shown that legislation "cannot operate with reasonable efficiency unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication" (1) and he concluded his judgment by enunciating the proposition that if the provisions of the Act "cannot

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“ operate efficiently and smoothly, unless the Crown is bound, “ . . . the Crown must be held to be bound by necessary “ implication ” (1). Applying the general principle in this sense, and in the light of the knowledge which the court had of existing conditions in Bombay, the Chief Justice came to the conclusion that the corporation could not be sure of carrying out its statutory duty efficiently unless it had the same powers in relation to the Crown as it possessed in respect of the subject. The High Court therefore held that the question put in the special case must be answered in the affirmative.

Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888. It may also be objected that the view taken by the High Court appears to ignore the possibility that the legislature may have expected that the Crown would be prepared to co-operate with the corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the corporation beyond that point would be unwise. As was pointed out by Wills J. in *Gorton Local Board v. Prison Commissioners* (2), it may be reasonable to suppose that the legislature has no less confidence in a department which represents the Crown than in a local authority. Apart from these considerations, however, their Lordships are of opinion that to interpret the principle in the sense put on it by the High Court would be to whittle it down, and they cannot find any authority which gives support to such an interpretation.

It was contended on behalf of the respondents that whenever a statute is enacted “ for the public good ” the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. This contention, which did not meet with success in the High Court, was again raised before their Lordships. The proposition which the respondents thus sought to maintain is supported by early authority, and is to be found in Bacon's Abridgment and other text-books, but in their Lordships' opinion it cannot now

(1) I. L. R. [1944] Bom. 104. (2) [1904] 2 K. B. 165 (n), 168.

be regarded as sound except in a strictly limited sense. Every statute must be supposed to be "for the public good," at least in intention, and even when, as in the present case, it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment. In the recent case of *Attorney-General v. Hancock* (1) Wrottesley J. cited a series of decisions in which the Crown was held not to be bound although the statute in question was clearly for the public benefit. A plain and striking example is the case which their Lordships have already cited, *Gorton Local Board v. Prison Commissioners* (2), where it was held that a by-law, made under the Public Health Act, 1875, and clearly designed to safeguard the health of the public, did not bind the Crown, and gave the local board no control over one of His Majesty's prisons. In the present case the High Court disposed of the submission by a finding that, on the material before them, it was not shown to be for the public good that the Crown should be bound by the Municipal Act. This is, perhaps, not a wholly satisfactory way of dealing with the respondents' contention, which was, not that the court must consider whether it is for the public good that the Crown should be bound by a particular Act, but that wherever an Act is "for the public good" it must be taken to bind the Crown. Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.

It is necessary to deal here with one further point which was not argued before the High Court. While this appeal was under their Lordships' consideration their attention was directed to some weighty observations in two Scottish cases which suggested a possible answer to the Crown's claim to exemption.

(1) [1940] 1 K. B. 427, 435. (2) [1904] 2 K. B. 165 (n), 168.

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These observations are to be found in *Somerville v. Lord Advocate* (1) (particularly in the judgment of Lord Kyllachy (2)), and in *Magistrates of Edinburgh v. Lord Advocate* (3), per Lord Dunedin (then Lord President). It will be sufficient to quote a passage from the judgment of Lord Dunedin in the latter case, in which he said (4) :—" I may say that I agree personally with the views expressed by Lord Kyllachy in *Somerville's* case, and I think the outcome of it is this : " While I do not doubt that there are certain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute, or certain enactments with penal clauses adjoined, as, for example, certain provisions of the Motor Car Act, and so on—yet, when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this, I think, would be so in the case of regulations which are meant to apply to all the land in a city, and where the Crown's property is not property held *jure coronæ*, but has been acquired from a subject-superior for the use of one of the public departments."

In the present case it appears that the land of the Crown is not held *jure coronæ* but, as has been said, was acquired from private owners, so that the dicta of the learned Lord President are directly in point. Their Lordships thought it right to require further argument on this aspect of the appeal, but, after careful consideration, remain of opinion that the law of England, and of India, is what they have stated it to be, and that no distinction can be drawn in such a case as the present between property held *jure coronæ* and other property of the Crown. The view expressed in the Scottish cases has not been adopted in England, and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail. Their Lordships have accordingly considered the question before them in the light of the principle as they have stated it. In so stating it their Lordships believe that they have done no more than express in their own words a well-settled proposition of law, and they need only refer, in addition to the cases already cited, to *Hornsey Urban Council v. Hennell* (5) and *Cooper v. Hawkins* (6).

(1) (1893) 20 R. 1050.

(2) Ibid. 1064, 1065.

(3) 1912 S. C. 1085.

(4) Ibid. 1090-1.

(5) [1902] 2 K. B. 73.

(6) [1904] 2 K. B. 164.

After full consideration their Lordships can find no reason to say that, by necessary implication, the Crown is bound by the relevant sections of the Municipal Act. They were pressed with the argument that such an inference might be drawn from certain express references to the Crown in other parts of the Act itself, and from the fact that by the Government Building Act, 1899, the legislature had provided for the exemption of government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted in one part of an Act, or in a later general Act, *ex abundanti cautela*, and, so far as the Act of 1899 is concerned, it is fallacious to argue that the legislature which passed it must have had in mind the particular sections of the Act of 1888 which are now under review, or that it was impliedly interpreting those sections.

For these reasons their Lordships have come to the conclusion that the appeal ought to be allowed. The decree of the High Court should be set aside, and a decree substituted declaring that the Crown is not bound by s. 222, sub-s. 1, and s. 265 of the City of Bombay Municipal Act, 1888, and ordering that, in accordance with the agreement between the parties, the defendants (the respondents to this appeal) shall bear their costs and pay the plaintiff its costs of the special case. The costs of this appeal must be paid by the respondents. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *The Solicitor, India Office.*

Solicitors for respondents : *Sanderson, Lee & Co.*

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AND

CANADIAN BROADCASTING CORPORATION . RESPONDENTS

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Lease—Radio broadcasting station—Validity—Interpretation—Effect—Covenant to keep “whole of the demised premises “modern and up-to-date and in good repair and operating condition” —Construction.

By an indenture of lease “as of May 15, 1933” the appellants, the owners of a private radio station, leased to the Canadian Radio Broadcasting Commission their land and premises and all plant and equipment “2. for and during the term of three years “to be complete and ended on May 15, 1936,” at a rent of \$12,000 yearly, payable in advance in equal quarterly instalments. It was provided by cl. 4 of the lease that “the lessee covenants with the “lessor to keep the whole of the demised premises modern and “up-to-date and in good repair and operating condition,” and by cl. 12 that “at the expiration of the term hereby granted and of “every succeeding term of three years to be granted by the lessor “to the lessee as hereinafter provided the lessor will grant “a new lease for a further term of three years from the determination of the present or then existing lease and if no such “new lease be entered into as aforesaid the present or then “existing lease, as the case may be, and all the terms and conditions “thereof shall continue until terminated by the lessor upon one “month’s notice in writing to the lessee” The necessary statutory approval of the lease by the Governor in Council under s. 9 of the Canadian Broadcasting Act, 1932, as amended by s. 2 of c. 35 of the Statutes of 1932–33, was explicitly stated to be of a lease “for a period of three years at a price of \$12,000 per “annum,” and no reference was made to any conditions. On the expiry of the term of three years on May 15, 1936, no new lease was entered into, but the Commission remained in occupation and continued to pay the rent quarterly. On January 26, 1938, the Canadian Broadcasting Corporation, the respondents, which were constituted under the Canadian Broadcasting Act, 1936, and took over thereunder all the obligations and liabilities of the Commission,

**Present*: VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD GODDARD and LORD UTHWATT.

gave notice to terminate the lease at May 15, 1938. Thereupon, the appellants, in April, 1938, instituted the present proceedings claiming, inter alia, a declaration that the lease was valid and subsisting and for specific performance; alternatively, they claimed a declaration that the respondents were tenants under a yearly tenancy expiring on May 15 in each year on the terms of the lease so far as applicable; they also claimed damages in respect of the respondents' alleged failure to keep the demised premises modern and up-to-date and in good repair and operating condition.

Held, first, that cl. 12 of the lease, which modified cl. 2 by providing that in the absence of a month's notice the parties were to remain indefinitely in the relation of landlord and tenant, was unauthorized by the Order in Council, which had approved a lease for a period of three years only, and was invalid ab initio, and ineffectual to extend the relation of tenancy beyond May 15, 1936. Clause 12 was, however, severable, and its elimination left an effective three years' lease. The payment and acceptance of rent and the continuance of the respondents' possession after May 15, 1936, had in law the result that from and after that date the relation of the parties was by presumption of law that of landlord and tenant under a year to year tenancy terminable by six months' notice on either side before May 15 in any year, and all the terms of the original lease, so far as consistent with a yearly tenancy, were thenceforth by law binding on the respondents, including the obligations of cl. 4. The notice to the appellants to terminate the lease as from May 15, 1938, being dated less than six months before that date, was accordingly bad, and was ineffective to all intents and purposes.

Held, secondly, that the respondents were at the time the action was brought in breach of the covenant contained in cl. 4, and the matter must be referred to the Master of the Supreme Court at Toronto to determine the amount of the damages in accordance with the law and practice of the court. The terms of the covenant were unusual and of very wide scope, but having regard to the nature of the premises and the purpose for which they were designed and used it was enforceable as a condition of the respondents' yearly tenancy and must receive a fair and reasonable interpretation. While it was not possible to devise a precise formula for the instruction of the referee, the covenant must be construed in a business sense. The obligations of the lessee were to be construed as being obligations to keep the whole of the demised premises modern and up-to-date in so far as the thing demised was capable of being kept modern and up-to-date, so that if the existing site of the station was inadequate for the accommodation of the plant necessary for a modern station the respondents were under no obligation to acquire additional land, and the duty imposed on them by the covenant did not extend to the substitution of an installation involving the use of higher power than that of the station demised. The damages for breach must depend on the loss suffered by the appellants from the respondents' failure to fulfil the covenant. Liability for the costs of the reference to the

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Master was to be determined by the court in their discretion after the damages had been assessed.

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Judgment of the Court of Appeal for Ontario [1943] O. R. 599, varied.

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CONSOLIDATED APPEALS (No. 20 of 1944 and No. 16 of 1945), the first from a judgment of the Court of Appeal for Ontario (July 9, 1943) which dismissed (with a variation as to costs) the the appellants' appeal and the respondents' cross-appeal from a judgment of Greene J. (September 1, 1942) whereby the appellants were awarded \$12,000 as rent and found entitled to damages for breach of a covenant in a lease granted by the appellants to the respondents, the covenant being to keep the demised radio broadcasting station modern and up-to-date and in good repair and operating condition.

The second appeal (No. 16 of 1945) was from the judgment of the Court of Appeal for Ontario (July 9, 1943) dismissing the cross-appeal by the Canadian Broadcasting Corporation from the judgment of Greene J. (September 1, 1942).

The following facts are taken from the judgment of the Judicial Committee. The appellants were the owners of a private radio station, originally designated by the letters CKGW, at Bowmanville, some forty miles from Toronto, which they began to operate in 1928. In 1933 the Canadian Radio Broadcasting Commission, constituted under the Canadian Radio Broadcasting Act, 1932, who were then organizing a basic network of stations across Canada, entered into negotiations with the appellants with a view to acquiring a lease of their undertaking. As a result of those negotiations the appellants and the Commission, on June 9 and 16, 1933, executed an indenture of lease "as of" May 15, 1933. The subjects of the demise were described as consisting of the lands and premises of the appellants at Bowmanville and "all plant and equipment owned by the lessor and used by it in connexion with the operation of radio broadcasting station CKGW, the whole of the said property being hereinafter referred to as the 'demised premises'." The lease in cl. 2 was expressed to be "for and during the term of three years to be computed from the 15th day of May, 1933, and thenceforth next ensuing, and fully to be complete and ended on the 15th day of May, 1936." The stipulated rent was \$12,000 yearly, payable in advance in equal quarterly instalments of \$3,000 on the 15th days of May, August, November and February.

The lease contained two covenants which figured so largely in the controversy between the parties that it is necessary to quote them textually as follows :—" 4. And the lessee covenants with the lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition."

" 12. And also that at the expiration of the term hereby granted and of every succeeding term of three years to be granted by the lessor to the lessee as hereinafter provided the lessor will at the costs and charges of the lessee grant a new lease for a further term of three years from the determination of the present or then existing lease at the same rental per annum as provided for by the present lease irrespective of any buildings, erections and improvements erected or made thereon or therein by the lessee and the lessee covenants and agrees to accept such new lease and to execute the same, and if no such new lease be entered into as aforesaid the present or then existing lease, as the case may be, and all the terms and conditions thereof shall continue until terminated by the lessor upon one month's notice in writing to the lessee. Provided, however, that the lessor shall not be under any obligation to grant a new lease unless the lessee shall have fully paid, observed and performed all rents, covenants and agreements contained in the present or then existing lease, as the case may be." There was also a clause conferring on the lessee an option at any time during the currency of the lease or any renewal thereof to purchase the whole of the demised premises at a price to be agreed or, failing agreement, to be fixed as therein provided.

The Commission entered into possession of the demised premises and proceeded to utilize the station. On the expiry of the term of three years on May 15, 1936, no new lease was entered into between the parties, but the Commission remained in occupation and continued to pay the rent quarterly. On November 2, 1936, the Canadian Broadcasting Act, 1936, came into force, whereby the Canadian Broadcasting Corporation, the present respondents, were constituted. That Act repealed the previous statute of 1932, and by s. 25 provided that the Corporation should take possession of all property and assets and assume all the obligations and liabilities of the Canadian Radio Broadcasting Commission, the original lessees. On January 26, 1938, the Corporation addressed a letter to the appellants stating that because of the completion of their new

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station at Hornby they would not further require the premises covered by the indenture of lease, and giving notice to terminate at May 15, 1938. The appellants at once challenged the validity of the notice and the right of the Corporation to terminate the lease, and on April 30, 1938, they raised the present action in which they advanced a series of alternative claims dependent on the view which the court might take of the rights of the parties inter se. Their first claim was for a declaration that the lease, or an antecedent agreement of lease, was valid and subsisting, and for specific performance. Alternatively, they claimed a declaration that the respondents were tenants of the appellants under a yearly tenancy expiring on May 15 in each year on the terms of the lease or agreement so far as applicable. As a further alternative they claimed payment of \$250,000 for the use and occupation of the demised premises from May 15, 1933, to May 15, 1938. They also claimed damages in respect of the respondents' failure to keep the demised premises modern and up-to-date and in good repair and operating condition.

The trial judge (Greene J.) ordered that the appellants recover from the respondents the sum of \$12,000 (being one year's rent under the lease) and damages, to be determined by the Master, for breach of the covenant to keep the whole of the premises modern and up-to-date and in good repair and operating condition. On appeal the Court of Appeal (Henderson, Gillanders and Laidlaw JJ.A.) in effect affirmed the judgment of the trial judge and, subject to a variation directing the respondents to pay the costs of the reference in any event, dismissed the appeal and the cross-appeal by the respondents against the relief awarded to the appellants.

The terms of the relevant legislation appear from the judgment of the Judicial Committee.

1946. June 18, 19, 20, 24, 25 and 27. *C. F. H. Carson K.C.* (of the Canadian Bar) and *Sir Valentine Holmes K.C.* for the appellants. The first point is that the respondents sought to rely on s.2 of c. 35 of the amending Act of 1933 as showing that the approval of the Governor in Council was necessary before the Commission could acquire the appellants' station, and that the lease was null and void because its terms exceeded the authority granted. Sub-section 3 of s. 1 of c. 65 of the Act of 1935, however, provided that "on and after April 1, 1936, "c. 51 of the statutes of 1932" [The Canadian Radio Broadcasting Act, under which the Commission was constituted] "shall be read as if c. 35 of the statutes 1932-33 and c. 60 of the

“statutes of 1943 and c. 24 of the statutes of 1935, had, “respectively, never been enacted.” Accordingly, the respondents cannot in these proceedings rely on s. 2 of c. 35 of the statutes of 1932-33 to show that the consent of the Governor Council to the lease was essential: *Lemm v. Mitchell* (1) supports that contention. [Reference was also made, on the interpretation of statutes, to s. 19 (b) and (c) of c. 1 of the R. S. C. 1927.]

Secondly, if we are wrong on the first point, and the temporary legislation can still be read in, then it is submitted that the lease is nevertheless valid and subsisting. Under s. 2 of the Amending Act of 1933 the Governor in Council could have approved the acquisition of the station by lease without attaching any conditions, and the highest it can be put in favour of the respondents is that the Order in Council gave authority to lease subject only to two restrictive conditions, namely, as to the term and the rent. Once that approval was given the Commission could then include in the lease any terms or contractual provisions that were within its powers. [Reference was made to *Taylor v. Directors, Etc., of the Chichester and Midhurst Ry. Co.* (2).] If we are wrong on the first two points, it is next submitted that the power of the Commission in June, 1933, was to acquire existing stations by lease with the approval of the Governor in Council, but it was clearly the Commission's responsibility to secure that approval. The appellants were entitled to assume that they had done so, and as between the Commission and the appellants this must now be treated as a valid lease.

Fourthly, after May 15, 1936, there was some tenancy, and by their very conduct in remaining in possession and paying rent and not intimating to the appellants that they had any different intention from that expressed in the lease, it must be taken that the tenancy was not a tenancy from year to year, but one in the terms of the lease. There was never any suggestion that the tenancy was not of the character it would have been if they had executed the new three years' lease. A yearly tenancy is one which is presumed if no other tenancy appears, but if it does, then the presumption is rebutted. The sub-lease to Mr. Purdy can only be consistent with a new three years' lease. Even if the courts below were right in their view that the tenancy was no more than a yearly one, there

(1) [1912] A. C. 400, 401, 403. (2) (1870) L. R. 4 H. L. 628,

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has been no valid notice of termination ; the notice given was a nullity, and the tenancy continues until it has been properly terminated : *Johnstone v. Hudlestone* (1), *Doe d. Murrell v. Milward* (2), *P. Phipps & Co. v. Rogers* (3) and *Hankey v. Clavering* (4).

Fifthly, the validity of the lease is *res judicata* ; the respondents cannot now be heard to question its validity because in certain litigation begun in 1934 by the King Edward Hotel Co. against the present appellants the Commission was brought in as a third party, and the appellants founded their successful claim to indemnity against the Commission on the very lease which is questioned in this appeal. [On the point of estoppel by record, reference was made to *Hoystead v. Commissioner of Taxation* (5), *New Brunswick Ry. Co. v. British and French Trust Corporation* (6), *Great North-West Central Ry. v. Charlebois* (7) and *Hughes v. Northern Electric and Manufacturing Co.* (8).]

Sixthly, on the question of the covenant to keep modern and up-to-date—and that is important whether it is a valid lease or a yearly tenancy—the courts below have by a concurrent finding found that that covenant was not carried out. The covenant must be construed with reference to its subject-matter—a radio station—and on its true construction the respondents are bound to supply from time to time such new parts of plant and equipment (whether major or subordinate parts) as would be required by current good practice to keep the whole of the plant and equipment as modern and up-to-date as is possible on the demised site notwithstanding (a) a substituted method of operation or a different or more powerful type of plant or equipment is thereby adopted, or (b) any new part of the plant and equipment replaces a part that is still capable of use and not out of repair, or (c) any such new part replaces a part that was out-of-date at the making of the lease, or (d) such new plant or equipment may not be required by the Regulations. The fact that ultimately the plant may be a different one from what it was in 1933 is involved in the covenant : *Proudfoot v. Hart* (9), *Lurcott v. Wakely and Wheeler* (10).

(1) (1825) 4 B. & C. 922.

(2) (1838) 3 M. & W. 328.

(3) [1925] 1 K. B. 14.

(4) [1942] 2 K. B. 326.

(5) [1926] A. C. 155, 165, 170.

(6) [1939] A. C. 1.

(7) [1899] A. C. 114.

(8) (1914) 50 S. C. R. (Can.) 626, 655-56.

(9) (1890) 25 Q. B. D. 42, 49.

(10) [1911] 1 K. B. 905.

We are entitled to the most modern plant that this site can accommodate.

Lastly, if the tenancy is held to be valid and subsisting it is submitted that the judgment below should be varied so as to direct that damages for breach of the covenant to keep modern should be assessed down to the time of the assessment. If the tenancy is held to be from year to year the judgment below should be varied so as to declare in effect that the appellants are entitled to recover from the respondents rent at the rate of \$12,000 per annum as and from May 15, 1938, until such tenancy is terminated.

Sir Valentine Holmes K.C. followed.

Le Quesne K.C., *John Jennings K.C.* (of the Canadian Bar) and *Gahan* for the respondents. If the effect of the relevant statutory provisions is traced out through the Acts from the beginning the appellants' contention arising under sub-s. 3 of s. 1 of the Act of 1935 must fail, and under s. 2 of the Act of 1933 the approval of the Governor in Council to the lease was essential. [Reference was made to *Lemm v. Mitchell* (1).] Next, on a proper construction of the Order in Council the Commission had not contractual capacity to enter into the lease, for the authority was for a lease of three years and not more, and in fact they have entered into a lease which, by cl. 12, binds them for an indefinite time. That is beyond the powers given by the Order in Council. The effect is that in the absence of a renewal lease it becomes a perpetual lease, which the Commission cannot enter into, and on that point alone, and for that reason alone, this lease is bad. Further it is submitted that the obligation in cl. 4 to keep modern goes far beyond any necessary or implied authority that may be held to have been given to the Commission. The lease, though it involves several distinct things, is one agreement, and to alter it by striking out cl. 12 and treating the rest of the lease as valid and binding would be to alter completely the scope and intention of the agreement entered into. Clause 12 cannot be treated independently of the rest of the contract: *Hopkins v. Prescott* (2), *Attwood v. Lamont* (3). If either cl. 12 or cl. 4 is bad, it is impossible to say that the rest of the agreement can stand.

What happened in the King Edward Hotel action would not estop the Commission themselves from asserting in this action,

(1) [1912] A. C. 400, 404.

(3) [1920] 3 K. B. 571, 579-80.

(2) (1847) 4 C. B. 578, 597.

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if they had been defendants, that the lease was bad. Estoppel ceases to be of interest to anyone if the lease is good. Assuming that it is bad, the Commission, by failing to challenge its validity in the earlier action, cannot be liable in law to make payments under the lease whether as damages or otherwise: *Maritime Electric Co. v. General Dairies, Ltd.* (1). The principle was applied to estoppel set up on the ground of judgment in *Griffiths v. Davies* (2). Further, even if the Board be of opinion that the Commission was estopped, that is not sufficient to impose the same restriction of the respondent Corporation; here there is no such privity between the Corporation and the the Commission as would impose on the former the estoppel that might operate on the latter: *Liverpool and North Wales Steamship Co., Ltd. v. Mersey Trading Co., Ltd.* (3).

Assuming the lease to be void, the contention against the respondents is that there is a tenancy from year to year. The Order in Council, however, cannot be construed to give authority to enter into a lease for more or less than three years. The right conclusion is that these premises were occupied by the respondents not on the basis of any tenancy from year to year, but simply on the basis of use and occupation, and not of demise at all. It cannot be said that a yearly tenancy was ever in any sense in the contemplation or intention of the parties. The question, what should be inferred, is one of fact, and it is not possible to draw the inference that the parties were holding over under a tenancy from year to year, and there is no irrebuttable presumption in favour of such a tenancy in such circumstances as these: *Dougal v. McCarthy* (4), *Cole v. Kelly* (5) and *Smith's Leading Cases*, 14th ed., vol. 2, p. 117, note. A difficulty also arises under the Canadian Broadcasting Act of 1936, because the suggested tenancy from year to year is at \$12,000 a year, whereas the Act, in s. 10, prohibits the Corporation from entering into an agreement in excess of \$10,000. If it is a tenancy from year to year, there then arises the question whether proper notice was given; if the respondents failed to do so, then the tenancy continues, and one would not expect to find cl. 4 in a short tenancy.

John Jennings K.C. followed. The covenant in cl. 4, if valid, on its true construction requires that the respondents should, during the time the covenant is in force, keep the transmitters

(1) [1937] A. C. 610, 622.

(2) [1943] K. B. 618, 621.

(3) [1909] 1 Ch. 209, 217.

(4) [1893] 1 Q. B. 736, 743.

(5) [1920] 2 K. B. 106, 133.

and antennæ and tubes and accessories on the site at Bowmanville as modern and up-to-date as they are capable of being made economically, and only to the extent that a reasonable owner, advised by a reasonable and reasonably progressive radio engineer, would decide on. So construed, the respondents' obligation would not require them to : (a) Acquire more land ; (b) set up a station on another site ; (c) instal at the present site transmitters or antennæ other than those on the site on May 15 1933 ; (d) increase the power of the station on the present site beyond 5 KW. long wave and 1 KW. short wave ; (e) make installations and replacements to the extent that what was thereafter on the site would be other than that demised to the Commission ; (f) instal any new part or replace any old part which, if so installed or replaced at the site would merely render a service or perform a function beyond that required at any material time by duly constituted authority ; (g) replace any part of the demised plant and equipment still capable of useful function without impairing the service which the station was required to render to the public ; (h) replace any part of the demised plant and equipment merely because some improvement had been invented unless failure to do so would materially impair the service required to be rendered to the public ; (i) replace any part or parts in respect of which improvements have become available if such replacements on the present site would result in no material improvement in the service required to be rendered to the public, and (j) make any expenditure on the station which would be unreasonable and uneconomical having regard to the unsuitable nature of the site and to the fact that the station could not be operated by a private owner. [Reference was made to *Lister v. Lane and Nesham* (1) and to the Short Form of Leases Act, R. S. O., 1937, c. 159.]

C. F. H. Carson K.C. replied. This was a lease for three years at a rent approved by the Order in Council, which imposed only two limitations, rent and term, and gave the Commission complete liberty as to other terms. On renewal of leases and successive leases, see *Rider v. Ford* (2) and *Guardian Realty Co. v. Stark* (3). If it be right that the lease is a valid and subsisting instrument, then the remedy the appellants seek is specific performance, and that is, an order to the effect that the respondent Corporation do all things necessary to carry out the

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(1) [1893] 2 Q. B. 212, 216.

(3) (1922) 64 S. C. R. (Can.)

(2) [1923] 1 Ch. 541. 207, 211.

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obligations of the Commission—if the latter was under an obligation to enter into successive leases, so also was the Corporation. If the lease is void, and there is a tenancy from year to year, then it was not validly terminated, and the judgment below should have so declared; that judgment should be varied so as to declare in effect that the appellants are entitled to recover from the respondents rent at the rate of \$12,000 a year as and from May 15, 1938, until such tenancy is terminated, together with interest on the quarterly payments from their respective due dates.

Oct. 10. The judgment of their Lordships was delivered by LORD MACMILLAN, who said that the present litigation was concerned with the chequered fortunes of the lease of May 15, 1933; its validity, its interpretation and its effect were all in issue. [His Lordship then stated the facts set out above, and continued:] The respondent Corporation stated a preliminary plea to the jurisdiction of the court, alleging that they were an “emanation of the Crown” and as such could not be impleaded in the Supreme Court of Ontario but could be proceeded against only by way of petition of right in the Exchequer Court of Canada. Their Lordships share the difficulty expressed in a previous case by Luxmoore L.J. on behalf of the Board in understanding the precise meaning of this somewhat spectral plea (*International Ry. Co. v. Niagara Parks Commission* (1)), but as it was repelled in the courts in Ontario and was abandoned at their Lordships’ bar no more need be said about it.

The main attack of the respondents in their defence was directed against the validity of the lease, which they maintained was ab initio null and void. To appreciate this contention it is necessary to enter into some detail. At the time when the parties began their negotiations for the lease the Commission (the respondents’ predecessors) were, without prejudice to their general power to carry on the business of broadcasting in Canada, expressly empowered by their constituent Act of 1932, s. 9 (b), to “acquire existing private stations . . . by lease.” This was an unrestricted and unconditional power. But before the lease was signed in June, 1933, there had come into operation on May 23, 1933, an Act to amend the Act of 1932. By s. 2 of this amending Act s. 9 (b) of the Act of 1932 was repealed and a new paragraph (b) was substituted whereby the power of the Commission to acquire existing private stations by

(1) [1941] A. C. 328, 343.

lease was expressly made subject to the approval of the Governor in Council. In point of fact, although the lease makes no mention of any consent, the Commission on May 26, 1933, addressed a letter to the appropriate Minister stating that they had come to a very favourable agreement with the appellants for the leasing of their station and were extremely anxious to close the contract immediately. With this letter was enclosed "a report to Council covering the leasing of this station," and the letter concluded with a request that the report should be brought before the Council at its next meeting. This report is not produced, but it appears that the Commission recommended the sanctioning of a lease for five years at \$12,000 per annum. On the report being submitted the next day, May 27, 1933, with the concurrence of the Minister, to the Governor in Council, authority was granted to the Commission to take on lease the appellants' station "for a period of three years at a price of \$12,000 per annum. This expenditure to be made out of moneys appropriated by Parliament for the use of the Commission." The draft lease does not appear to have been laid before the Governor in Council, and the appellants were not parties to, nor do they seem at the time to have been aware of, the application for the approval of the Governor in Council. It will be observed that whereas the recommendation laid before the Council was of a lease for five years, the approval is of a lease for three years. The use of the word "price" was made the basis of an argument by the respondents that the total authorized expenditure was limited to \$12,000, but they ultimately conceded that "price" had no other signification than rent.

The Commission, having obtained this approval from the Governor in Council, signed the lease on June 16, 1933. The Corporation now assert that the lease is nevertheless null and void inasmuch as it exceeds in its terms the authority granted. Before discussing this contention it is necessary first to dispose of three matters raised by the appellants to exclude its admissibility. (1.) The appellants in the courts in Ontario and in their printed case before the Board sought to avoid all questions relating to the approval of the Governor in Council by maintaining that before this approval became a statutory essential on May 23, 1933, the parties had already made a binding agreement to enter into a lease on which the appellants could rely apart altogether from the lease itself. This submission was rejected by the courts in Ontario and, as it was abandoned at

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their Lordships' bar, it is unnecessary to consider it. (2.) The appellants next pleaded that the respondents were estopped from maintaining that the lease was null and void. At the time of the granting of the lease the appellants were tenants of certain offices and studios in the King Edward Hotel in Toronto, which they used in connexion with their broadcasting station under a lease dated December 1, 1927, and renewal thereof between the King Edward Hotel Co., Ltd., and the appellants. The Commission took possession of, and utilized, these offices and studios as included in the premises demised by the lease now under challenge, which contained a clause whereby the Commission undertook to indemnify the appellants against all claims and liabilities under, inter alia, the King Edward Hotel lease. In 1934 the King Edward Hotel Co., Ltd., brought an action against the appellants for rent and damages for breach of certain covenants of the tenancy. The appellants, founding on the indemnity clause in the lease between them and the Commission, served a third party notice on the Commission, which thereupon entered appearance in the action and lodged a statement of defence in which they admitted that by the lease of May 15, 1933, they leased all plant and equipment owned by the appellants and used by them in connexion with the operation of the radio broadcasting station CKGW. The proceedings resulted in judgment for a substantial sum against the appellants, for which the Commission were found liable to indemnify the appellants. In the present action the appellants found on the admission made in the King Edward Hotel action as an estoppel by record precluding the respondents from now maintaining that the lease is null and void. It was, they say, to the interest of the Commission in this previous action to challenge the validity of the present lease, and to have done so successfully would have afforded a complete answer to the indemnity claim against them. The plea would have been a competent one and they omitted to take it. Both Greene J., the trial judge, and the Court of Appeal in the present case held that the respondents were by their admission in the King Edward Hotel action estopped from now denying the validity of the lease "in its entirety," although not precluded from maintaining their arguments on cls. 4 and 12. Their Lordships would point out that the issue of the validity of the lease was not raised in the action and that the alleged estoppel is against the pleading of a statute. (See *Griffiths v. Davies* (1) and cases

(1) [1943] K. B. 618.

there cited.) While the judgment against the Commission no doubt proceeded on their admission of the existence of a valid lease, imposing on them an effective obligation of indemnification, their Lordships are not satisfied that the present respondents are now precluded from challenging the validity of the lease as a whole on the ground of the provisions of cl. 12. As will appear, however, in the sequel, their Lordships' opinion on the merits renders it unnecessary to pursue or pronounce on the point.

(3.) The most formidable argument advanced by the appellants was founded on the terms of the legislation affecting the powers of the Commission and their successors, the present respondents. The requirement of the consent of the Governor in Council to a lease of a private station became operative for the first time, as has already been stated, on May 23, 1933, by virtue of the Act of that year (c. 35 of the statutes of 1932-33). This Act was a temporary measure, and by s. 4 was declared to expire on April 30, 1934. By two successive Acts passed in 1934 and 1935 (c. 60 of the statutes of 1934 and c. 24 of the statutes of 1935) the date of expiry of the Act of 1932 was postponed first to April 30, 1934, and then to June 30, 1935. Finally, on July 5, 1935, an Act was passed which provided as follows:—

“ 1.—(1.) The provisions of sections one, two and three of chapter thirty-five of the statutes of 1932-33 shall be deemed always to have been and hereafter they shall be, operative and in force only until the thirty-first day of March, 1936.

“ (2.) Section 4 of chapter thirty-five of the statutes of 1932-33 and chapter sixty of the statutes of 1934 and chapter twenty-four of the statutes of 1935 are wholly repealed.

“ (3.) On and after the first day of April, 1936, chapter fifty-one of the statutes of 1932 shall be read as if chapter thirty-five of the statutes of 1932-33 and chapter sixty of the statutes of 1934 and chapter twenty-four of the statutes of 1935, had, respectively, never been enacted.”

Fastening on the repeal in sub-s. (2.) of the legislation requiring the consent of the Governor in Council to any lease and on the words in sub-s. (3.) providing that this legislation is to be treated as if it had never been enacted, the appellants maintained that the respondents could not in the present proceedings found any argument against the efficacy in whole or in part of the lease on the requirement of the approval of the

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Governor in Council inasmuch as at the date of the raising of the present action the whole legislation imposing this requirement had been not only repealed but directed by Parliament to be treated as if it had never been enacted. A plea, they said, founded on a statute which was to be deemed never to have been enacted could manifestly not be sustained.

This argument, at first sight attractive as a point of pleading, is, in their Lordships' opinion, untenable on a sound appreciation of the structure and terms of the Act of July 5, 1935, above quoted. The first temporary amending Act of 1933 repealed certain provisions of the principal Act of 1932 and substituted other provisions in their place. The operation of this amending Act was continued down to June 30, 1935, by two further Acts. Then by the Act of July 5, 1935, its operation was further extended to March 31, 1936, but only till then. The sections of the three temporary Acts prescribing successive dates of expiry of this temporary legislation were repealed. The result is that on March 31, 1936, the temporary legislation contained in the first Act of 1933 repealing provisions of the principal Act of 1932 and substituting other provisions came to an end not by repeal of the temporary legislation but by the efflux of the prescribed time. No question as to the revival of the temporarily repealed provisions of the principal Act of 1932 by the repeal of repealing legislation arises. The repeal effected by the temporary legislation was only a temporary repeal. When by the fiat of Parliament the temporary repeal expired, the original legislation automatically resumed its full force. No re-enactment of it was required. This is what sub-s. (3.) of the Act of July 5, 1935, was designed to make clear. The principal statute of 1932 is to be read on and after April 1, 1936, as if the temporary legislation had never been enacted; it is to be in force as if there had been no temporary legislation affecting its provisions. Sub-section (3) does not say that the temporary Acts are for all purposes to be treated as if they had never been enacted. It says only that the principal Act is to be read in future as if the temporary Acts had never been enacted. If the temporarily repealed provisions of the principal Act had not on April 1, 1936, come into operation again, freed of the modifications substituted by the temporary legislation, the Commission would have been left without powers essential for the conduct of their business until November 2, 1936, when the Canadian Broadcasting Act of June 23, 1936, came into operation incorporating their successors,

the present Corporation, and providing them with a complete code of revised powers.

Accordingly, in their Lordships' opinion, the respondents are not precluded by the terms of the Act of July 5, 1935, from now maintaining that under the temporary Act of May 23, 1933, the approval of the Governor in Council was essential when the lease in question was signed. The appellants are not entitled to say that the court has been enjoined by Parliament to disregard the temporary Act of May 23, 1933, as if it had never been enacted. These points having been disposed of, the question has now to be considered whether the lease can be said to have had the requisite approval of the Governor in Council. The approval accorded by the Order in Council of May 27, 1933, was explicitly stated to be of a lease "for a period of three years at a price of \$12,000 per annum." Nothing is said about any conditions. The respondents submit that no conditions were thereby approved other than those which in common form are included in a normal lease. In particular, they say that no authority was conferred to enter into a lease containing the far-reaching provisions of cl. 12, and they maintain that although their predecessors signed the lease they are now entitled to resist its enforcement as being *ultra vires*, either in whole or, at least, so far as regards cl. 12.

Their Lordships agree with the learned judges of the Court of Appeal that cl. 12 does not technically convert the lease into a perpetual lease. But one thing is clear, namely, that cl. 12 modified the operation of cl. 2, which provided that the tenancy should be completely ended on May 15, 1936. It bound the parties to a continued tenancy beyond the term of three years. Notwithstanding the expiry of the three years the parties, in the absence of a month's notice by the appellants or the exercise by the respondents of their option to purchase, were to remain indefinitely in the relation of landlord and tenant. This, in their Lordships' opinion, was plainly unauthorized by the Order in Council. Clause 12, inasmuch as it never was approved by the Governor in Council, was ineffectual to extend the relation of tenancy beyond May 15, 1936. The question whether the unauthorized stipulations in cl. 12 rendered the whole lease null and void *ab initio* (assuming this argument to be open to the respondents) or whether cl. 12 was severable and could be disregarded, leaving the rest of the lease unaffected, was debated. The three years from May 15, 1933, to May 15, 1936, whether years of tenancy under the lease or years of use

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and occupation without any contract of tenancy, are past and gone, and the appellants have received payment of \$12,000 in respect of each of those three years.

Both the courts in Ontario have held that cl. 12 is severable and that its elimination leaves an effective three years' lease. With this finding their Lordships agree. What has next to be determined is the legal position of the parties after May 15, 1936, and when the present action was raised. Here their Lordships find themselves in agreement with the courts in Ontario that from and after May 15, 1936, the relation of the parties was by presumption of law that of landlord and tenant under a year to year tenancy terminable by six months' notice on either side before May 15 in any year. The payment and acceptance of rent and the continuance of the respondents' possession after May 15, 1936, had in law this result. Further, all of the terms of the original lease so far as consistent with a yearly tenancy were thenceforth by law binding on the respondents. Clause 12, of course, disappears, but the obligations of cl. 4 subsist as not being incompatible with a yearly tenancy. It will be borne in mind that at May 15, 1936, there was no legislation in force requiring the approval of the Governor in Council to a lease by the Commission of a private radio station, and therefore there was then no impediment in the way of the Commission entering on a yearly tenancy at their own hand and on any terms.

The respondent Corporation, after their constitution on November 2, 1936, continued to occupy "the demised premises" and to pay rent as their predecessors, the Commission, had done. On December 21, 1937, they sub-leased to Mr. Purdy the manager's house at Bowmanville, part of "the demised premises," for a term of one year and four months from December 31, 1937, to April 30, 1939. Notwithstanding these facts the respondents, as already stated, on January 26, 1938, gave notice to the appellants to terminate the lease of "the demised premises" as from May 15, 1938. This notice being dated less than six months before May 15, 1938, was obviously bad, and so it has been held by the courts in Ontario. But while ineffectual to terminate the tenancy at May 15, 1938, the notice has been held by the courts in Ontario as a good notice to terminate the tenancy at May 15, 1939. With this view their Lordships are unable to agree. The notice, in their opinion, was ineffectual to all intents and purposes.

The ground has now been cleared sufficiently to enable the

legal position of the parties at the date of the raising of the present action on April 30, 1938, to be defined. The respondents were then tenants under the appellants of "the demised premises" on a year to year tenancy terminable by six months notice on either side at May 15 in any year, at a yearly rent of \$12,000, and otherwise subject to the terms of the lease of 1933 so far as applicable to a yearly tenancy, cl. 12 thereof being in particular excluded. The appellants are accordingly entitled to a declaration to this effect.

Both the trial judge and the Court of Appeal held that the respondents' tenancy was brought to a termination at May 15, 1939, by the notice of January 26, 1938. On this footing the learned trial judge by his order gave judgment for the appellants for \$12,000, being a year's rent from May 15, 1938, to May 15, 1939, and also found the respondents liable to the appellants for damages for breach of the covenant in cl. 4, the damages to be determined as at May 15, 1939, by a reference to the Master. His order was affirmed in these respects by the Court of Appeal. Their Lordships are unable to agree with this manner of disposing of the case. When the action was brought in April, 1938, the yearly tenancy, as the courts in Ontario and their Lordships agree, was subsisting. It was an action brought by a landlord against his tenant during the currency of the tenancy. No rent was then due and resting owing, the quarterly rent due at May 15, 1938, having been paid in advance. Their Lordships feel difficulty in understanding how in those circumstances judgment could be given in this action for rent not due when it was raised. The rent subsequent to May 15, 1938, will appropriately be recoverable under the declaration proposed to be pronounced as to the continued subsistence of the tenancy. It may be that effective steps have now been taken by the respondents by due notice to terminate the tenancy.

Then, as to the claim of damages, their Lordships have no hesitation in upholding the concurrent judgments of both courts in Ontario that the respondents were at the time of the raising of the action in breach of the covenant contained in cl. 4 of the lease. Where a claim is made by a landlord against his tenant for breach of covenant, during the currency of the tenancy, which is the present case, the measure of damages is the diminution in the value of the reversion resulting from the breach, without prejudice to any further claim which the landlord may have at the termination of the tenancy. Here, how-

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ever, both courts, having held that the tenancy had terminated on May 15, 1939, have ordered the damages to be assessed as at that date. In their printed cases laid before the Board both parties take exception to this date. The appellants, citing r. 260 of the Ontario court, maintain that the damages, being in respect of a continuing cause of action, should be assessed down to the time of the assessment, while the respondents maintain that the damages should be determined on the basis of the facts as they existed on or before April 30, 1938, when the writ in the action was issued. Their Lordships, unfortunately, did not have a full argument on those procedural topics owing to the concentration of discussion on the numerous other points in controversy, but it would appear that the appropriate course would be to pronounce a declaration finding that as at April 30, 1938, the respondents were in breach of their obligation to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition and to refer to the Master of the court at Toronto to determine the amount of the damages in accordance with the law and practice of the court.

It now only remains to consider the question of the interpretation of the covenant "to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition." The terms of the covenant are unusual and of very wide scope, but having regard to the nature of the premises and the purpose for which they were designed and used their Lordships are of opinion that it is enforceable as a condition of the respondents' yearly tenancy. It was suggested in the Court of Appeal that if an extreme interpretation were placed on the covenant the result might be to render it inapplicable altogether, first as being originally unauthorized by the approval of the Governor in Council, and second, as not being such a provision as the law would import into a yearly tenancy. In their Lordships' opinion, however, the covenant is binding on the respondents and must receive a fair and reasonable interpretation. The appellants furnished detailed particulars of the breaches which they alleged, and a considerable amount of evidence was led on the subject, with the result, as already stated, that both courts in Ontario held that the respondents had committed a breach of the covenant and were liable in damages. The trial judge assessed the damages at \$25,000, subject to the right of either party to have the damages ascertained by a reference. The appellants elected to have the matter referred, and the learned judge accordingly, as already

set out, referred to the Master of the Supreme Court the determination of the amount of the damages, which he directed to be ascertained as at May 15, 1939. He further ordered that the appellants should have the costs of the reference if the sum awarded exceeded \$25,000, but should be liable in the costs of the reference if \$25,000 or less were awarded. The Court of Appeal varied this part of the trial judge's order and directed that the appellants should have the costs of the reference in any event. On this question their Lordships are of opinion that liability for the costs of the reference should be left to the determination of the court in their discretion after the damages have been assessed.

The interpretation and application of the covenant to keep the whole of the demised premises modern and up-to-date was the subject of much debate before their Lordships, as it had been in the courts in Ontario. The appellants complained that too narrow a construction had been placed on it, while the respondents sought to restrict its scope. In their Lordships' view it is not possible to devise a precise formula for the instruction of the referee, and they think it undesirable by anticipation to fetter unduly the business judgment which it will be his province to exercise. They agree, however with many of the general observations made by Greene J. and the learned judges of the Court of Appeal in so far as they emphasize that it is the demised premises, that is, the station, studio and offices as let, that are to be kept modern and up-to-date, and that if the existing site of the station is inadequate for the accommodation of the plant necessary for a modern station the respondents are under no obligation to acquire additional land. Again, Henderson J. well expresses it when he says—
 "The obligations of the lessee are to be construed as being
 "obligations to keep the whole of the demised premises modern
 "and up-to-date, in so far as the thing demised is capable of
 "being kept modern and up-to-date." (1) Applying this, their Lordships note that the station demised is a five kilowatt station, and the duty imposed on the respondents by the covenant does not extend to the substitution of an installation involving the use of higher power. The damages for breach must, of course, depend on the loss suffered by the appellants from the respondents' failure to fulfil the covenant. The covenant must be construed in a business sense. The referee will have before him the appellants' detailed particulars of claim.

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It will be for him to determine which items are admissible and practicable and what sums he should assess as representing the damages for failure on the part of the respondents to do what he finds they ought to have done.

While their Lordships have found themselves largely, though not entirely, in agreement with the judgment under review they are of opinion that the most convenient course will be to recall the orders of Greene J. and the Court of Appeal of September 1, 1942, and July 9, 1943, and in lieu thereof to remit to the court of Ontario :—

1. To declare that cl. 12 of the lease of May 15, 1933, was invalid ab initio, but that otherwise the said lease was valid and binding on the parties thereto in all its terms.

2. To declare that as from and after May 15, 1936, the Commission, and the defendants as their successors, became, and that at the date of raising the present action they still were, the tenants of the plaintiffs in the premises described as the demised premises in the lease of May 15, 1933, under a yearly tenancy terminable on six months' notice on the 15th day of May in any year on the terms contained in the said lease so far as applicable to a yearly tenancy, including the covenant contained in cl. 4 but excluding the covenant contained in cl. 12.

3. To declare that the defendants are liable to pay to the plaintiffs the yearly rent of \$12,000 as stipulated in the said lease as from May 15, 1936, until the defendants' yearly tenancy of the demised premises is duly terminated.

4. To declare that the defendants were at April 30, 1938, in breach of the covenant contained in the said lease to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition, and that the plaintiffs are entitled to recover in the present action damages from the defendants for such breach.

5. To order that it be referred to the Master of the Supreme Court at Toronto to determine the amount of the said damages in accordance with the law and practice of the court.

6. To adjudge the defendants to make payment to the plaintiffs of the sum so determined.

7. To order that liability for the costs of the said reference be determined by the court in their discretion after the damages have been assessed.

Their Lordships are further of opinion that the judgment of Greene J. and the Court of Appeal as to the costs of the parties

in the courts of Ontario should otherwise be affirmed. As regards the costs of the present appeal and cross-appeal to this Board, both parties have to a large extent failed to make good their contentions and each party will bear their own costs. Their Lordships would not think it right to give more precise directions as to procedural matters on which their Lordships have heard no argument and are not adequately informed. Their Lordships will humbly advise His Majesty that the appeal and the cross-appeal be disposed of in the manner above indicated and that the judgments of Greene J. and of the Court of Appeal be varied accordingly.

Solicitors for the appellant company : *Lawrence Jones & Co.*

Solicitors for the Canadian Broadcasting Corporation : *Charles Russell & Co.*

[PRIVY COUNCIL.]

CO-OPERATIVE COMMITTEE ON
JAPANESE CANADIANS AND
ANOTHER APPELLANTS ;
AND

ATTORNEY - GENERAL FOR CANADA
AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

Canada—Orders in Council—Deportation to Japan of specified persons—Deprivation of status as British subject or Canadian national—Deportation of wives and children of deported persons—Validity—War Measures Act, R. S. C. 1927, c. 206, ss. 3, 6—National Emergency Transitional Powers Act, 1945, S. C., c. 25, ss. 2 (e), 4—British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17) (as amended to 1922) (12 & 13 Geo. 5, c. 44), s. 9—Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), ss. 2, 3—Statute of Westminster, 1931 (22 Geo. 5, c. 4), s. 2—Orders in Council of Dec. 15, 1945 (P. C. 7355, 7356, and 7357) of Canada.

Three Orders in Council, P. C. 7355, 7356 and 7357, dated

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD UTHWATT and SIR LYMAN DUFF.

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December 15, 1945, stated in their recitals to be made by the Governor in Council under the authority of the War Measures Act, R. S. C. 1927, c. 206, and which were continued in force by an Order in Council passed pursuant to s. 4 of the National Emergency Transitional Powers Act, 1945, provided in substance as follows :— Sub-sections 1, 2 and 3 of s. 2 of P. C. 7355, authorized the Minister of Labour to make orders respectively for deportation to Japan of the following persons, of sixteen years of age or over, who were resident in Canada and had made a request for repatriation : (1.) Every person, other than a Canadian national, who was a national of Japan ; (2.) every naturalized British subject of the Japanese race, and (3.) natural-born British subjects of the Japanese race. By sub-s. 4 of s. 2 of P. C. 7355 " The wife and " children under sixteen years of age of any person for whom the " Minister makes an order for deportation to Japan may be included " in such order and deported with such person."

P. C. 7356 provided that a British subject by naturalization who was deported under P. C. 7355 should, as from the date of deportation, cease to be either a British subject or a Canadian national. P. C. 7357 provided, inter alia, for the appointment of a Commission to make inquiry concerning the activities, loyalties and extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in cases where their names were referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case such persons should be deported :—

Held, that the three Orders in Council were in their entirety intra vires the Governor in Council. On its true construction the War Measures Act authorized the making of orders for deportation of any person, whatever his nationality, and the deprivation, so far as the law of Canada was concerned, of his status under that law as a British subject or Canadian national.

The Orders in question were " law " made by the Parliament of the Dominion at the date of their promulgation, which was after the passing of the Statute of Westminster, and accordingly the Colonial Laws Validity Act, 1865, afforded no ground for questioning the validity of the Orders in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, of the Imperial Parliament.

Lastly, with regard to sub-s. 4 of s. 2 of P. C. 7355, the substance of the matter had to be considered, and the power was not used for an unauthorized purpose when under sub-s. 4 an order was made for the deportation of the wives and children (under 16) of persons with respect to whom a deportation order had been made. Opinion of the Supreme Court of Canada [1946] S. C. R. (Can.) 248, affirmed.

APPEAL (No. 58 of 1946) by special leave by the Co-operative Committee on Japanese Canadians and by the Attorney-General for Saskatchewan from the opinion certified by the Supreme

Court of Canada (February 20, 1946), on a reference ordered by the Governor-General in Council under s. 55 of the Supreme Court Act, R. S. C. 1927, c. 35. The question referred for hearing and consideration was as follows:— "Are the Orders " in Council, dated December 15, 1945, being P. C. 7355, 7356 " and 7357, ultra vires of the Governor in Council either in " whole or in part and, if so, in what particular or particulars " and to what extent ? "

The facts, the terms of the three Orders in Council and the provisions of the relevant statutory provisions set out below are taken from the judgment of the Judicial Committee.

The recitals to the Orders in Council which it was sought to impeach showed that they purported to have been made under the authority of the War Measures Act. That Act was first passed by the Parliament of Canada in 1914, and was now c. 206 of the R. S. C. 1927. Section 2 provided that the issue of a proclamation by His Majesty, or under the authority of the Governor in Council, should be conclusive evidence that war, invasion, or insurrection, real or apprehended, existed and of its continuance until by the issue of a further proclamation it was declared that war, invasion or insurrection no longer existed. The proclamation first called for by that section was duly made but no proclamation that the war no longer existed had been made. The relevant sections of that Act were as follow:—

" 3. The Governor in Council may do and authorize such " acts and things, and make from time to time such orders and " regulations, as he may by reason of the existence of real or " apprehended war, invasion or insurrection, deem necessary " or advisable for the security, defence, peace, order and " welfare of Canada ; and for greater certainty, but not so as to " restrict the generality of the foregoing terms, it is hereby " declared that the powers of the Governor in Council shall " extend to all matters coming within the classes of subjects " hereinafter enumerated, that is to say:—

" (a) Censorship and the control and suppression of publi- " cations, writings, maps, plans, photographs, communications " and means of communication ;

" (b) Arrest, detention, exclusion and deportation ;

" (c) Control of the harbours, ports and territorial waters of " Canada and the movement of vessels ;

" (d) Transportation by land, air, or water and the control " of the transport of persons and things ;

" (e) Trading, exportation, importation, production and " manufacture ;

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“(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

“(2.) All orders and regulations made under this section shall have the force of law”

“6. The provisions of the three sections last preceding shall only be in force during war, invasion, or insurrection, real or apprehended.”

The three Orders in Council were all made on December 15, 1945. The preamble to the first Order (P. C. 7355) contained the following recitals :—“Whereas during the course of the war with Japan certain Japanese Nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise ;

“And whereas other persons of the Japanese race have requested or may request that they be sent to Japan ;

“And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above ;

“And whereas it is considered necessary for the security, defence, peace, order and welfare of Canada, that provision be made accordingly.”

The first Order (s. 2, sub-ss. 1, 2, 3 and 4) then authorized the Minister of Labour to make orders for deportation “to Japan ” of the following persons.

(1.) Every person of sixteen years of age or over, other than a Canadian national, who was a national of Japan resident in Canada and who had since December 8, 1941 (the date of the declaration of war by the Dominion against Japan) made a request for repatriation or who had been detained under certain regulations and was so detained on September 1, 1945.

(2.) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who had made request for repatriation, provided that such request had not been revoked in writing before midnight on September 1, 1945.

(3.) Natural-born British subjects of the Japanese race of sixteen years of age or over resident in Canada, who made a request for repatriation and did not revoke it in writing before the Minister had made an Order for “deportation.”

Sub-section 4 of s. 2 provided as follows :—“(4.) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person.”

The remaining provisions of that Order were of an ancillary or administrative nature.

The second Order (P. C. 7356) provided that any person being a British subject by naturalization under the Naturalization Act, c. 138, R. S. C. 1927, who was deported from Canada under the provisions of P. C. 7355, should as from the date on which he left Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

The third Order (P. C. 7357) provided for the appointment of a Commission to make inquiry concerning the activities, loyalties and extent of co-operation with the government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in cases where their names were referred to the Commission by the Minister of Labour for investigation with a view to recommendation whether in the circumstances of any such case, such persons should be deported. The Commission was also at the request of the Minister of Labour to inquire into the case of any naturalized British subject of the Japanese race who had made a request for repatriation, and make recommendations. It was then provided that any person of the Japanese race who was recommended by the Commission for deportation, should be deemed to be a person subject to deportation under the provisions of P. C. 7355, and as from the date on which he left Canada in the course of deportation, he should cease to be either a British subject or a Canadian national.

There was one further Act of the Parliament of the Dominion to which it was necessary to refer—the National Emergency Transitional Powers Act, 1945. That Act was assented to on December 18, 1945. It was to come into force on January 1, 1946, and on and after that day the war against Germany and Japan was for the purposes of the War Measures Act to be deemed no longer to exist. The Act was to continue in force until December 31, 1946, or, if Parliament were not then sitting, until a date determined by the sitting of Parliament. The Act recited the War Measures Act and the continuance of a national emergency arising out of the war since the unconditional surrender of Germany and Japan, and the necessity that the Governor in Council should exercise certain transitional powers during the continuation of the exceptional conditions brought about by the war and the necessity that certain acts and things done and authorized, and certain orders and regulations made under the War Measures Act be continued in force, and that it was essential that the Governor in Council be authorized to do and authorize such further acts, and make such further orders

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and regulations as he might deem necessary or advisable by reason of the emergency and for the purpose of discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency. By s. 2 of the Act the Governor in Council was given power to make orders and regulations as he might, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for certain purposes set out therein. Those purposes did not include arrest, detention, deportation, or exclusion, but did include under sub-s. (e) :—" Continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during " and by reason of the war." Sub-section 3 of s. 2 provided for every Order in Council passed under the Act being laid before Parliament and being annulled on resolution of the Senate or the House of Commons. Section 4 provided as follows :—" Without prejudice to any other power conferred by this Act, " the Governor in Council may order that the orders and " regulations lawfully made under the War Measures Act or " pursuant to authority created under the said Act in force " immediately before the day this Act comes into force shall, " while this Act is in force, continue in full force and effect " subject to amendment or revocation under this Act."

On December 28, 1945, the Governor in Council passed Order in Council P. C. 7414, pursuant to s. 4 of the National Emergency Transitional Powers Act, 1945, providing that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the National Emergency Transitional Powers Act, 1945, should come into force, should, while the latter Act was in force, continue in full force and effect subject to amendment or revocation under the latter Act. The result of that legislation was that the Orders in Council were now in force, if at all, by virtue of the Transitional Act.

In connexion with the question raised by this case, three Acts of the Imperial Parliament were relevant. The first of those was the Colonial Laws Validity Act, 1865. Sections 2 and 3 of that Act ran as follows :—" 2. Any Colonial law which is or " shall be in any respect repugnant to the provisions of any " Act of Parliament extending to the Colony to which such law " may relate, or repugnant to any Order or Regulation made " under Authority of such Act of Parliament, or having in the " Colony the force and effect of such Act, shall be read subject

“ to such Act, Order, or Regulation, and shall, to the extent of
 “ such repugnancy, but not otherwise, be and remain absolutely
 “ void and inoperative.”

“ 3. No Colonial law shall be or be deemed to have been void
 “ or inoperative on the ground of repugnancy to the law of
 “ England, unless the same shall be repugnant to the provisions
 “ of some such Act of Parliament, Order or Regulation as afore-
 “ said.”

The second was the Statute of Westminster, passed in the
 year 1931, which was duly adopted by the Parliament of
 Canada. Section 2 of that Act was in the following terms :—

“ 2.—(1.) The Colonial Laws Validity Act, 1865, shall not apply
 “ to any law made after the commencement of this Act by the
 “ Parliament of a Dominion.

“ (2.) No law and no provision of any law made after the
 “ commencement of this Act by the Parliament of a Dominion
 “ shall be void or inoperative on the ground that it is repugnant
 “ to the law of England, or to the provisions of any existing or
 “ future Act of Parliament of the United Kingdom, or to any
 “ order, rule or regulation made under any such Act, and the
 “ powers of the Parliament of a Dominion shall include the
 “ power to repeal or amend any such Act, order, rule or regul-
 “ ation in so far as the same is part of the law of the Dominion.”

The third Act was the British Nationality and Status of
 Aliens Act, 1914. Part I of that Act related to “ Natural-
 “ born British Subjects.” Part II related to the “ Naturali-
 “ zation of Aliens,” and s. 9 provided that Part II. should not,
 nor should any certificate of naturalization granted thereunder,
 have effect within any of the Dominions specified in the
 Schedule (which included Canada) unless the legislature of the
 Dominion adopted Part II. The Act of the Imperial Parliament
 was subsequently amended. The Parliament of Canada, by
 the Naturalization Act, 1914, did not in terms “ adopt ” the
 Imperial Act of 1914, but passed almost identical legislation.
 In 1915 the Parliament of Canada amended the Naturalization
 Act so as to introduce the amendments that had been made by
 the Parliament of Great Britain in Part II. of the British
 Nationality and Status of Aliens Act, 1914. That Act of 1915
 contained a recital to the effect that the Dominion had adopted
 Part II of the British Act.

In the Supreme Court of Canada, in answer to the question
 submitted, Rinfret C.J., Kerwin and Taschereau JJ. gave the
 opinion that the Orders in Council in question were not ultra

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vires the Governor in Council either in whole or in part. Hudson and Estey JJ. were of the opinion that the Orders in Council were not ultra vires the Governor in Council, with the exception of sub-s. 4 of s. 2 of P. C. 7355. Rand J. was of the opinion that P. C. 7355 was not ultra vires the Governor in Council in relation to Japanese nationals and to persons of the Japanese race naturalized under the Naturalization Act of Canada, as well as to persons voluntarily leaving Canada, but was ultra vires in relation to the compulsory deportation of natural-born British subjects resident in Canada and of the wives and children under sixteen who did not come within the first two classes. Kellock J. was of the opinion that P. C. 7355 was not ultra vires, except sub-ss. 3 and 4 of s. 2. Rand and Kellock JJ. were also of the opinion that P. C. 7356 and 7357 were ultra vires in certain respects.

1946. July 16, 17, 18 and 19. *F. A. Brewin* (of the Canadian Bar) and *C. Shawcross* for the appellant the Co-operative Committee on Japanese Canadians. The unconditional surrender of the Japanese was in August, 1945, so that the Orders in Council of December, 1945, were made when the war was over. Four classes of persons are involved in P. C. 7355, and sub-s. 2 of s. 2 of that Order applies to naturalized British subjects under whatever Act they were naturalized, whether Imperial or the Act of another Dominion, in contrast with P. C. 7356, where the Naturalization Act of Canada is expressly mentioned. There is no definition of "person of the Japanese race." No orders of deportation have yet been made. The appellants object to the validity of deportation "to Japan" as not being authorized by the War Measures Act, 1914; the Parliament of Canada did not by the terms of that Act delegate to the Governor in Council the power to make orders providing for the exile, to Japan, of British subjects whether by birth or naturalization, resident in Canada, as provided by P. C. 7355 and 7357. [The War Measures Act, 1914, now R. S. C. 1927, c. 206, and the National Emergency Transitional Powers Act, 1945, under which the Orders, if valid, now take effect, were referred to.]

The Orders in Council, made under the War Measures Act of 1914, are repugnant to the Imperial British Nationality and Status of Aliens Act, 1914, which was adopted by, and extends to, the Dominion of Canada. The Colonial Laws Validity Act, 1865, therefore applies. Parliament could not enact the Orders

until after the Statute of Westminster, 1931; regulations made under a previous Act are not enough. In the general language of the War Measures Act must be read, at least before the Statute of Westminster, an implied limitation that it did not authorize the Governor in Council to do something it could not do, namely, to make a regulation or order inconsistent with an Imperial statute. [Reference was made to *Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto* (1), and to *Macleod v. Attorney-General for New South Wales* (2).] If my argument is right, that before 1931 the Parliament of Canada itself could not even in express terms pass an Act repugnant to the British Nationality and Status of Aliens Act, then the general language of the War Measures Act must be read subject to that limitation. The Statute of Westminster has not affected or changed the proper interpretation of statutes passed before it came into force. In other words, if there was a statute such as the War Measures Act in force before the Statute of Westminster, which had on a proper interpretation certain implied limitations or conditions, there was nothing in the Statute of Westminster to say that it should be interpreted in a different sense.

The next point is that Parliament did not, on the proper construction of the War Measures Act, delegate to the Governor in Council the authority to remove forcibly to Japan British subjects resident in Canada. If correct, that submission applies to "natural-born British subjects" (sub-s. 3 of s. 2 of P. C. 7355), "naturalized British subjects" of the Japanese race (sub-s. 2 of s. 2) and also covers the wives and children (sub-s. 4 of s. 2). The only case in which the function of the enumerated heads of s. 3 of the War Measures Act was referred to was *Re Gray* (3). All those enumerations would be quite unnecessary if the opening general words were so broad as to permit anything at all to be done. It is submitted that where Parliament has said, using the language in *Gray's* case (3), that the powers of the Governor in Council can go even as far as the forcible removal of aliens as a preventative war time measure, then the expulsion of British subjects to a country from which they have not come is going beyond the margin, and is a matter on which there is an unresolved doubt. [Reference was made to Maxwell on the Interpretation of Statutes, 8th ed., p. 130.] Even general

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(1) [1943] S. C. R. (Can.) 1, 10.

(3) (1918) 57 S. C. R. (Can.)

(2) [1891] A. C. 455.

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words should not be interpreted as being intended to be anything repugnant to international law or the comity of nations unless it is clear that they be so. It is purely a rule of construction which, it is submitted, applies in this case both to the meaning of the word "deportation" and to the general words with which the section opens: The *Le Louis* (1); *Croft v. Dunphy* (2). The comity of nations recognizes the right to deport aliens, but by clear implication it does not recognize the right to force a country to accept nationals of another country, and in the present case the receiving country is not the place of origin: Oppenheim's International Law, 4th ed., vol. I., pp. 560, 562; Wheaton's International Law, 6th ed., pp. 210-11; Hall's International Law, 6th ed., vol. I., p. 493; and *Attorney-General for Canada v. Cain* (3). On the meaning of "deportation" see Webster's Dictionary. Reliance is also placed on the fact that in a whole series of Canadian Acts, beginning with the Immigration Act, R. S. C. 1927, c. 93, there is a statutory definition given to the word "deportation" which is not broad enough to cover what is proposed to be done here. [Reference was also made to *Shin Shim v. The King* (4).] Further, the Imperial Aliens Act, passed a few days before the Canadian Act, provides for the deportation of aliens only. On the question of construction I call in aid the well known principle that statutes which invade the liberty of the subject should be expressed in clear and unambiguous language. It is conceded that that general rule must give way to the pressing purposes of war: *Liversidge v. Sir John Anderson* (5), but where there is an ambiguous word like "deportation" very different considerations apply.

These Orders in Council constitute an interference with "property and civil rights," a field assigned exclusively to the Provincial legislature under head 13 of s. 92 of the British North America Act, 1867. After January 1, 1946, no such emergency existed as justified such an interference as we have here with the normal constitutional structure, and to the extent that s. 4 of the National Emergency Transitional Powers Act, 1945, purports to authorize the Governor in Council to carry out something not already begun it is ultra vires. It is conceded that on the authority of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.* (6), the Provincial power under "property and civil

(1) (1817) 2 Dodson 210, 239.

(2) [1933] A. C. 156, 177-8.

(3) [1906] A. C. 542, 545.

(4) S. C. R. 57 (Can.) 378.

(5) [1942] A. C. 206.

(6) [1923] A. C. 695.

"rights" could be overridden while an emergency lasts, but even during the war it could only be overridden to the extent that it was related to the emergency. Legislation of the Dominion interfering with the normal constitutional structure in relation to property and civil rights and not connected with post-war necessity is invalid: *In re Price Bros. & Company and the Board of Commerce of Canada* (1), where the difference between the war and post-war situation is pointed out.

The next point is that if these Orders in Council which, it is contended, are all part of one scheme, are invalid, they are not severable, and must all fall together. In other words, if the argument that P. C. 7356 and 7357 are invalid is correct, then they are such an essential part of the scheme that the rest of the Orders cannot stand. The court cannot presume that the Governor in Council would have seen fit to carry out the truncated orders and to give validity to what is left: *In re the Validity of Manitoba Act* (2), and on appeal, sub nom. *Attorney-General for Manitoba v. Attorney-General for Canada* (3).

The last matter is in relation to the question of loss of nationality; that loss is not effectively achieved by these orders for deportation because the loss of status as a British subject is necessarily incidental to effective legislation in relation to deportation. The Orders in Council empowering orders to be made for the deportation of persons "of the Japanese race" are so vague that they are incapable of application to ascertained persons and are therefore inoperative and invalid, and do not constitute orders or regulations such as the Governor in Council is empowered to make under the provisions of the War Measures Act.

F. A. Brewin and *G. Wilson* (of the Canadian Bar) for the appellant the Attorney-General for Saskatchewan associated themselves with the submissions made on behalf of the Co-operative Committee on Japanese Canadians, and contended that the proper answer to the question referred should have been that the impugned Orders in Council were in their entirety ultra vires the Governor in Council.

H. E. O'Donnell K.C. (of the Canadian Bar), *Gahan* and *W. R. Jackett* (of the Canadian Bar) for the respondent the Attorney-General for Canada. With regard to the right to deport British subjects, and whether "deportation" is wide

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(1) (1920) 60 S. C. R. (Can.) 265, 279. (2) [1924] S. C. R. (Can.) 317, 323.

(3) [1925] A. C. 561, 568.

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enough to include them, the widest possible powers were deemed to be necessary for the Governor in Council in 1939 as in 1914, when the War Measures Act was passed. The words "deportation" and "exclusion" in the War Measures Act include the power to remove from Canada all those mentioned in the Orders in question. The opening words of s. 3 of that Act, giving plenary authority to the Governor in Council, and the statement that the enumeration which follows shall not restrict the generality of the opening words, are sufficient to give the Governor in Council the necessary powers to pass the Orders even if that power were not included in the words "exclusion" and "deportation." The language of s. 3 is to be given its natural effect; the words are very broad and general: *Attorney-General for Alberta v. Attorney-General for Canada* (1). The Governor in Council was entitled to consider whether a person might be deported, British subject, alien or anyone who was within the contemplation of Parliament as the Act indicates without distinction. On the interpretation the appellants seek of the word "deportation" two words have to be read into the section, "of aliens." [Reference was made to the definition of "deportation" in the Oxford English Dictionary, to *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)* (2), and to the Immigration Act, R. S. C. 1927, c. 93, s. 2 (c).] "Deportation" in s. 3 of the War Measures Act is unqualified and is broad enough to cover all classes of persons, and the general power is not in any way cut down by the specific enumeration in s. 3: *Re Gray* (3).

Gahan followed. These three Orders in Council are laws made by the Parliament in Canada, and they are laws made after the passing of the Statute of Westminster. "Laws" as used in that Act include laws, orders or regulations pursuant to delegated authority. It is said for the appellants, however, that the authority under which the Orders in Council were made—the War Measures Act—was long antecedent to the Statute of Westminster. It is submitted that it follows as a logical necessity that if the date of the making of the law is after the passing of the Statute of Westminster, the law is one of the Parliament of Canada, and notwithstanding the fact that the authority for making the law is antecedent, the law itself is *intra vires*. For the Colonial Laws Validity Act, 1865, to have any bearing on this matter the appellants must show an Act of

(1) [1943] A. C. 356, 370. (3) 57 S. C. R. (Can.) 150.

(2) [1931] A. C. 662.

the Imperial Parliament which by express words or necessary intendment applies to Canada and a law of the Canadian Parliament which is repugnant to the Imperial Act. They purport to find that Imperial legislation in the British Nationality and Status of Aliens Act, which, they say, was adopted by Canada, and that therefore it is an Act which extends to Canada to which the Orders in Council are repugnant. The key to the position is that the word "adopted" can be used in two different senses. When in the Imperial Act Parliament speaks of "adopting" this Act, it means taking such action as would make the Imperial Act part of the law of Canada so that it is that Act which operates in Canada. "Adoption" may be used in quite a different sense, however; for instance, there are bodies in Canada for promoting uniformity of law in the Provinces, and one Province in that sense adopts the laws of the other; but none of those adoptions mean that the legislation of the one Province is operative in the other, and it is submitted that the Canadian Parliament was very deliberately refraining from making the English law operative in Canada, although it was carefully providing that under its own rule the same result would be produced. The British Nationality and Status of Aliens Act is not an Act which extends to Canada unless Canada adopts the Act. That must be done directly by the Parliament of Canada. In the Imperial Act there is a provision that that Act and the certificate of naturalization granted should have no effect in any of the self-governing Dominions unless the Dominion adopted it. Canada was not adopting the Act in that sense; it was passing parallel legislation, and therefore the position is that under s. 9 of the Imperial Act a certificate of the Secretary of State granted to an alien in England, who then went to Canada, would have no effect in Canada because Canada was not adopting the Act. Canada, wishing to approve of the scheme of the British legislation, has in fact enacted that within the bounds of Canada a certificate granted by the British shall have the same force as if the Canadian Minister had himself granted a Canadian certificate. The test is, what the Parliament of Canada did; the Imperial Act was not adopted in Canada, and by express terms it was not extended. If, therefore, the Imperial Act has not been adopted, the question of repugnancy does not arise.

It is submitted that the view of Rinfret C.J. and the two judges who concurred with him is right, and that the three

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Orders in Council are in their entirety valid. With regard to severance, in *Attorney-General for Ontario v. Attorney-General for Canada* (1) and *Insurance Act of Canada, In re* (2) there was a series of enactments which could be separated, while here there is only the one question. This is not a case where the women and children have to be deported, it is a discretion given to the Minister. If the other parts are valid, the provision that in suitable cases the wives and children should be deported is ancillary and should be held valid.

Gordon Wismer K.C. (of the Canadian Bar) and *Crispin* for the respondent the Attorney-General for British Columbia, supported and adopted the argument for the Attorney-General for Canada. As to severability, it was suggested for the appellants that the Order taking away nationality and changing the status was ultra vires, and that therefore the whole Order would be bad. It is submitted that the Order, if invalid, is severable, and that the orders could be carried into effect even if it is found that one class cannot be included: *Attorney-General for Canada v. Attorney-General for Ontario* (3). In any event, it is contended that these Orders in Council refer to persons who have no other racial origin than Japanese.

F. A. Brewin replied. If the Parliament of Canada is not to be taken by the course of what was done to have adopted the British Nationality and Status of Aliens Act, then certificates of nationalization granted by the Canadian authority have not got Imperial validity, and the holders are aliens within the rest of the Commonwealth and the United Kingdom—a sweeping effect. By their own recital the Parliament of Canada has adopted the Imperial Act. [Reference was made to *British Coal Corporation v. The King* (4) and *Minister of Health v. The King (on the Prosecution of Yaffe)* (5).]

December 2. LORD WRIGHT, delivering the judgment of the Board, stated the terms of the Orders in Council and the provisions of the relevant legislation as set out above, and said that it was convenient first to deal with the question raised as to the effect of the Naturalization legislation of the Dominion on the topic of the adoption of the British Nationality and Status of Aliens Act. His Lordship continued: The contention of the appellants was that the Parliament of Canada did

(1) [1937] A. C. 405, 409.

(4) [1935] A. C. 500, 507.

(2) [1932] A. C. 41.

(5) [1931] A. C. 494, 503.

(3) [1937] A. C. 355.

"adopt" Part II of the Imperial Act in the sense in which that word was used in the Imperial Act, and that in consequence Part II formed part of the law of the United Kingdom extending to the Dominion. The contention of the respondents was that the Canadian Statutes are only parallel legislation. In arriving at a conclusion as to the advice their Lordships think it right to tender to His Majesty they find it unnecessary to express an opinion as to the correctness or otherwise of the contention of the appellants. Their Lordships will assume that the appellants are right in their contention, but they do not express any opinion one way or another on it.

There was a considerable diversity of opinion between the members of the Supreme Court on some of the points which fell for decision under the reference. In one important respect at least—the invalidity of sub s. 4 of s. 2 of P. C. 7355—the views of the majority of the Court were adverse to the respondents. No cross-appeal was lodged. This in the circumstances was only the absence of a formality. A determination on the legal effect of the orders as a whole is necessary to arrive at a conclusion on the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety. Their Lordships now turn to the question at issue. On certain general matters of principle there is not, since the decision in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* (1), any room for dispute. Under the British North America Act property and civil rights in the several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge. Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer

(1) [1923] A. C. 695.

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exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers. Lastly, it should be observed that the judiciary are not concerned when considering a question of ultra vires with the question whether the executive will in fact be able to carry into effective operation the emergency provisions which the Parliament of the Dominion either directly or indirectly has made. It is unnecessary, therefore, for their Lordships to take into review or even to recount the particular circumstances obtaining within the Dominion that led to the Orders in question or the arrangements made with a view to their execution.

The validity of the War Measures Act was not attacked before their Lordships, and, consistently with the principles stated, was not open to attack. The validity of the orders was challenged on many grounds. Their Lordships have considered not only the points put forward on behalf of the appellants, but whether the orders were susceptible of criticism for reasons not put forward. Their Lordships are satisfied that all possible grounds of criticism were in one form or another included in the grounds on which the appellants relied. For the validity of the orders it is necessary first, that on the true construction of the War Measures Act, they fall within the ambit of the powers duly conferred by the Act on the Governor in Council, second, that, assuming the orders were within the terms of the War Measures Act, they were not for some reason in law invalid. The points taken were, first, that the War Measures Act did not on its true construction authorize orders for deportation to be made as respects British subjects or Canadian nationals, and that it should in certain respects receive a limited construction; second, that if the Act purported on its construction to authorize the making of such orders, yet the orders made would be contrary to the Imperial Statute, British Nationality and Status of Aliens Act, and therefore to that extent invalid; third, that the provision contained in s. 2, sub-s. 4, of P. C. 7355 (relating to the wives and children of persons in respect of whom an order for deportation had been

made) was for a specific reason invalid: fourth, that in any event the order made under the National Emergency Transitional Powers Act continuing the former orders of the Governor in Council was invalid.

The first point raises questions of construction with which their Lordships must now deal. The language of the War Measures Act is in general terms, but it was argued that certain limitations were as a matter of construction of the Act to be implied and that to the extent to which any order purporting to be made under the Act fell outside its proper ambit, the order would of necessity be invalid. The first suggested limitation was based on the Colonial Laws Validity Act, 1865. At the date when the War Measures Act came into force legislation made by the Parliament was in its effect subject to the provisions as to repugnancy contained in the Act of 1865, and it was argued that the War Measures Act should be construed as confined in its possible ambit to the making of orders which would, consistently with the Colonial Laws Validity Act, 1865, then be valid as law within the Dominion. If that was so the orders were not authorized by the War Measures Act in so far as they were repugnant to the British Nationality and Status of Aliens Act, 1914-18, which was an Act of the Imperial Parliament and in the appellants' contention extended to the Dominion as part of the law of the United Kingdom. Their Lordships are unable to accept this contention. The effect of the Colonial Laws Validity Act, 1865, was only that Canadian legislation repugnant to the statutory law of the United Kingdom applying to the Dominion was inoperative. The only conclusion to be drawn from a consideration of the Colonial Laws Validity Act is that the War Measures Act did not on its true construction confer a power beyond the extent to which it might at the date of its use be validly exercised. The statutory law of the United Kingdom is not static and, in their Lordships' opinion, there is no justification for the imputation that the Parliament of Canada legislated on the footing that it is static. The effectiveness of legislation of the Parliament of the Dominion at the date when those delegated powers are exercised, not the limitation on that legislation at the date when the War Measure Act was passed, is, so far as the Act of 1865 is concerned, the relevant matter.

Secondly, it was argued that, as a matter of construction, the War Measures Act did not authorize the making of orders having an extra-territorial operation. This point was relevant by

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reason that the orders in question in terms authorized "deportation." This point may be shortly disposed of. Extra-territorial constraint is incident to the exercise of the power of deportation (*Attorney-General for Canada v. Cain* (1)), and was, therefore, in contemplation. Any lingering doubts as to the validity in law of an Act which for its effectiveness requires extra-territorial application were, it may be added, set at rest by the Canadian Statute, the Extra-Territorial Act, 1933.

Thirdly, it was argued that the War Measures Act should be construed as authorizing only such orders as are consistent with the accepted principles of international law, and that the forcible removal to a foreign country of British subjects was contrary to the accepted rules of international law. The Act therefore as a matter of construction did not, it was said, purport to authorize orders providing for such removal. It may be true that in construing legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law (cf. *Croft v. Dunphy* (2)), but the nature of the legislation in any particular case has to be considered in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor in Council of powers vested in the Parliament of the Dominion at a time when war, invasion, or insurrection or their apprehension exists. The accepted rules of international law applicable in times of peace can hardly have been in contemplation, and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.

The next question of construction arising under the Act has more substance. It was said that there was inherent in the word "deportation" as part of its meaning the necessity that the person to be deported was—as respects the State exercising the power—an alien. The express power given to expel persons from Canada was therefore limited to aliens, i.e., persons who were not Canadian nationals. It was not permissible to treat as authorized by the general power a power to make orders for deportation in relation to a class of persons impliedly excluded from deportation by the terms of the specific power. There was therefore an implied prohibition against the deportation of Canadian nationals. On this

(1) [1906] A. C. 542.

(2) [1933] A. C. 156.

argument it may be conceded that commonly it is only aliens who are made liable to deportation, and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration. The dictionaries, as might be expected, do not altogether agree as to the meaning of deportation, but the Oxford English Dictionary gives as its definition "The action of carrying away : forcible removal, especially into exile : transportation." As a matter of language, their Lordships take the view that "deportation" is not a word which is misused when applied to persons not aliens. Whether or not the word "deportation" is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found. In the present case the Act is directed to dealing with emergencies ; throughout it is in sweeping terms, and the word is found in the combination "arrest, detention, exclusion and deportation." As regards the first three of these words, nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found, establish, in their Lordships' view, that in this statute the word "deportation" is used in a general sense and as an action applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian nationals. Nationality per se is not a relevant consideration. An order relating to deportation would not be unauthorized by reason that it related to Canadian nationals or British subjects. Even if this were not the case, the same result may be reached by another route. The general power given to the Governor in Council in the opening part of s. 3 of the Act is not in this statute limited by reference to the acts particularly enumerated, and their Lordships see no reason for differing from the view expressed by Rinfret C.J. that the order was justifiable under that general power (see *King-Emperor v. Sibnath Banerji* (1))

There remains one further question of construction of The War Measures Act, namely, whether it authorized the making of an order which provided that deported persons should cease to be either British subjects or Canadian nationals. That matter must be considered in the light of views which their

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Lordships have already expressed as to the construction of the Act. They see no reason for excluding from the scope of the matters covered by the general power contained in s. 3 a power to take from persons who have in fact under an order for deportation left Canada their status under the law of Canada as British subjects and Canadian nationals.

The result is that on its true construction the War Measures Act authorized the making of orders for deportation of any person whatever be his nationality, and the deprivation, so far as the law of Canada was concerned, of his status under that law as a British subject or Canadian national.

The next question is whether The Colonial Laws Validity Act, 1865, applies to the orders of the Governor in Council. If it does, then in so far as they are repugnant to the British Nationality and Status of Aliens Act (which their Lordships are assuming to be an Act of the Imperial Parliament extending to Canada) they are invalid unless the provisions of the Statute of Westminster can be relied on. The contention of the appellants was that the orders, though law made after the date of the Statute of Westminster, were not law made after that date by the Parliament of the Dominion. The activities of Parliament in the matter in question had, it was said, ceased in 1927. The orders were not of its making. The passing by the Parliament of the National Emergency Transitional Powers Act, 1945, was, for the purpose in hand, immaterial, for the reason that s. 4 empowered the Governor in Council to order the continuance only of orders and regulations "lawfully" made under the War Measures Act. Their Lordships agree that in considering this particular matter the National Emergency Transitional Powers Act, 1945, cannot be prayed in aid of the validity of the orders, but in their opinion the orders in question were made "after" the passing of this Act [i.e., the Statute of Westminster] "by the Parliament of the Dominion" as that phrase is used in the Statute of Westminster. This, again, is a question of construction. Both in sub-ss. 1 and 2 of s. 2 of the Statute of Westminster the matter which is dealt with is "law," and that is a general term which includes not only statutes but also orders and regulations made under statutes. Undoubtedly, the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised. Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through

machinery set up and continued by it for that purpose. The Governor in Council has no independent status as a law-making body. The legislative activity of Parliament is still present at the time when the orders are made, and these orders are "law." In their Lordships' opinion they are law made by the Parliament at the date of their promulgation. A contrary conclusion would, in their Lordships' view, place an artificial and narrow construction on wide terms used in an Act of Parliament the subject-matter of which demands that a liberal construction should be put on the language used. In the result, therefore, the Colonial Laws Validity Act, 1865, affords no ground for questioning the validity of the orders.

The next matter arises on sub-s. (4) of s. 2 of P. C. 7355. Under that provision an order for deportation may be made as respects the wives and children (not over the age of sixteen years) of persons with respect to whom an order for deportation has been made. The case sought to be made runs as follows: The recitals in the order relate only to the desirability of making provision for the deportation of persons referred to in sub-ss. 1, 2 and 3 of s. 2 of the order. In the case of the classes of persons referred to in sub-ss 1, 2 and 3 (leaving aside detainees) request for repatriation was at some stage necessary; a request was considered by the Governor in Council to be a substantive matter, but no such request is required as respects the persons mentioned in sub-s. 4, and the only apparent reason for subjecting them to liability for deportation is that an order for deportation has been made as respects the husband or father. The order, therefore, not only does not show that by reason of the existence of real or apprehended war it was thought necessary for the security, peace, order, defence or welfare of Canada to make provision for their deportation but, when considered in substance, shows that these matters were not taken into consideration. A deportation of the family consequential on the deportation of the father might, indeed, be thought desirable on grounds other than those requisite for a due execution of the powers given and, it is contended, it is apparent that it is grounds not set out in the statute which alone have here been taken into consideration. The incompleteness of the recital is, in their Lordships' view, of no moment. It is the substance of the matter that has to be considered. Their Lordships do not doubt the proposition that an exercise of the power for an unauthorized purpose would be invalid, and the only question is whether there is apparent any matter which

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justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorized purpose. In their Lordships' opinion there is not. The first three sub-sections of s. 2 no doubt deal with the matter which primarily engaged the attention of the Governor in Council, but it is not in their Lordships' view a proper inference from the terms of those sub-sections that the Governor in Council did not also deem it necessary or advisable for the security, defence, peace, order and welfare of Canada that the wives and children under sixteen of deportees should against their will also be liable to deportation. The making of a deportation order as respects the husband or father might create a situation with which, with a view to forwarding this specified purpose, it was proper to deal. Beyond that it is not necessary to go.

The last matter of substance arises on the National Emergency Transitional Powers Act, 1946. It was contended by the appellants that at the date of the passing of this Act there did not exist any such emergency as justified the Parliament of Canada in empowering the Governor in Council to continue the orders in question. The emergency which had dictated their making—namely, active hostilities—had come to an end. A new emergency justifying exceptional measures may, indeed, have arisen, but it was by no means the case that measures taken to deal with the emergency which led to the Proclamation bringing the War Measures Act into force were demanded by the emergency which faced the Parliament of Canada when passing the Transitional Act. The order under the Act continuing the orders in question was therefore *prima facie* invalid. This contention found no favour in the Supreme Court of Canada, and their Lordships do not accept it. The preamble to the Transitional Act states clearly the view of the Parliament of the Dominion as to the necessity of imposing the powers which were exercised. The argument under consideration invites their Lordships, on speculative grounds alone, to overrule either the considered decision of Parliament to confer the powers or the decision of the Governor in Council to exercise them. So to do would be contrary to the principles laid down in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* (1) and accepted by their Lordships earlier in this opinion.

One remaining matter relied on by the appellants should be mentioned. First it was said that the words "of the Japanese "race" were so vague as to be incapable of application to ascer-

tained persons. It is sufficient to say that in their Lordships' opinion they are not. All that can be said is that questions may arise as to the true construction of the phrase and as to its applicability to any particular person, but difficulties of construction do not affect the validity of the Orders.

In the result, their Lordships find themselves in agreement with the conclusion at which Rinfret C.J. and Kerwin and Taschereau J.J. arrived, and for the reasons they have expressed will humbly advise His Majesty that none of the Orders in Council is in any respect ultra vires and that the appeal should be dismissed. There will be no order as to costs.

Solicitors for both appellants: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia: *Gard, Lyell & Co.*

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[PRIVY COUNCIL.]

MINISTER OF NATIONAL REVENUE . APPELLANT ;
AND
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

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Canada — Revenue — Income tax — Excess profits tax — Company — Deductions — "Expense" — Disallowance — Determination whether reasonable for business—Discretion of Minister—Reasons—Powers of court to interfere—Principles applicable—Reference back under inherent jurisdiction—Income War Tax Act, R. S. C. 1927, c. 97 (as amended by s. 17 of c. 34, 4 Geo. 6, 1940), s. 6, sub-s. 2—Excess Profits Tax Act, S. C. 1940, c. 32, s. 8 (b).

By s. 6, sub-s. 2, of the Income War Tax Act, R. S. C. 1927, c. 97: "The Minister may disallow any expense which he in his "discretion may determine to be in excess of what is reasonable "or normal for the business carried on by the taxpayer . . ."

The appellant, the Minister of National Revenue, purporting to act under sub-s. 2 of s. 6 of the Income War Tax Act, disallowed a part of certain sums, paid by the respondent company to an

*Present: VISCOUNT SIMON, LORD MACMILLAN, LORD WRIGHT, LORD GREENE M.R. and LORD SIMONDS.

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English company by way of commission in respect of various considerations under a contract, on the ground that they were in excess of what was reasonable for the business of the respondents, who had claimed that the sums were properly deductible in computing the amount of their taxable income. The contents of a report made by the local Inspector of Income Tax to the Minister were not communicated to the respondents at any stage, and the report was not produced nor was the nature of its contents disclosed either before the Supreme Court or the Judicial Committee of the Privy Council :—

Held, that the reference to " discretion " in s. 6, sub-s. 2, in this context does not mean more than that the Minister is the judge of what is reasonable or normal. While the court is entitled to examine the determination of the Minister, the limits within which it is entitled to interfere are strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court cannot interfere. The sub-section makes the Minister the sole judge of the fact of reasonableness or normalcy, and the court is not at liberty to substitute its own opinion for his, but his power is not arbitrary: dicta of Lord Halsbury L.C. in *Sharp v. Wakefield* [1891] A. C. 173 at 179 and of Lord Thankerton in *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue* [1940] A. C. 127, at 136, referred to.

There is nothing in the language of the Income War Tax Act or in the general law to compel the Minister to state his reason for taking action under s. 6, sub-s. 2—and he gave no reason for his decision in this case—but that does not necessarily mean that by keeping silence he can defeat the taxpayer's appeal. The court is always entitled to examine the facts which are shown by the evidence to have been before the Minister when he made his determination, and if in the opinion of the court they are insufficient in law to support it, the determination cannot stand. If, on the other hand, there was sufficient material before the Minister to support his determination, the court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion.

No material having been produced in this case on which the determination of the Minister could lawfully be founded, and which could have justified any disallowance, and the Minister not having chosen to produce any evidence of the contents of the report of the inspector, the Board were unable to assume in the Minister's favour that he had before him sufficient facts to support his determination. The only inference which could legitimately be drawn from the available evidence was that, apart from the documents which were before the court, the Minister had no material before him which influenced his mind in making the determination he did.

The reference back to the Minister by the Supreme Court to enable him to adjust the assessment in accordance with their

decision in favour of the respondents should have been made under the inherent jurisdiction of the court and not under s. 65, sub-s. 2, of the Income War Tax Act.

"Expense" as used in sub-s. 2 of s. 6 has a quite general meaning and is wide enough to cover any expenditure by the taxpayer whether made under or as a condition of obtaining a contract or otherwise. There is no justification for drawing a distinction between different kinds of contractual payments.

Judgment of the Supreme Court of Canada [1946] S. C. R. 139, affirmed with a modification.

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APPEAL (No. 64 of 1946), by special leave, from a judgment of the Supreme Court of Canada (January 24, 1946) reversing a judgment of the Exchequer Court of Canada (August 3, 1945) which had dismissed the appeal by the respondent company from a decision of the appellant, the Minister of National Revenue, affirming assessments to income tax and excess profits tax made on the respondents for the years 1940, 1941 and 1942.

The main questions which arose in this appeal were whether the appellant in assessing the respondents to income tax and excess profits tax for the years in question was entitled to disallow as deductions from income certain portions of the amounts paid by the respondents as commissions to an English company, Wrights' Ropes, Ltd., of Birmingham, which portions he had in his discretion determined to be in excess of what was reasonable or normal for the business carried on by the respondents; and whether the appellant was bound to disclose to the respondents and to put before the Exchequer Court the report and recommendations of the local inspector of taxes.

The relevant facts and statutory provisions appear from the judgment of the Judicial Committee.

The Exchequer Court (Cameron J.) dismissed the respondents' appeal against the Minister's decision. An appeal by the respondents to the Supreme Court of Canada (Rinfret C.J., Hudson, Kellock and Estey J.J., Kerwin J. dissenting) was allowed, and the assessments were referred back to the Minister under the provisions of s. 65, sub-s. 2, of the Income War Tax Act to be dealt with in accordance with the reasons for judgment of the majority of that court.

1946. Nov. 4, 5, 7. *Varcoe K.C.* (of the Canadian Bar) and *Gahan* for the appellant. Section 6, sub-s. 2, of the Income War Tax Act confers a power of disallowance on the appellant.

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In the absence of statutory requirement he need not give reasons for a decision made thereunder, and the onus is on the respondents who challenge the validity of his decision to show that it was not properly made. No such evidence has been adduced; what evidence there is supports the validity of the decision. It cannot be said that there was no relevant material before the Minister on which he could apply his discretionary power. Admittedly, he must act according to principle, that is, he must act responsibly and without bias: *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue* (1). In the absence of proof by the respondents that there was some failure on the part of the Minister to act responsibly the exercise of his discretion ought not to be interfered with. What the Minister did was thoroughly reasonable, having regard to the services which the Birmingham company might be called on to perform in the circumstances ---where the commissions had increased out of all expectation due to rapidly expanding business. The facts justified the disallowance, and there was no evidence that the Minister exercised his discretion improperly or on irrelevant or insufficient grounds or otherwise in disregard of sound and fundamental principles. The respondents were given ample opportunity to put forward all facts, representations and arguments which they might desire to advance. Section 6, sub-s. 1 (i), of the Act has no application in the circumstances, and in any event does not operate to restrict the powers conferred on the Minister by sub-s. 2 of s. 6. The report of the local inspector of income tax was a privileged departmental document which the respondents were not entitled to see. The fact that the appellant did not cause the report to be transmitted to the Exchequer Court did not justify the Supreme Court allowing the respondents' appeal inasmuch as (a) the report is a privileged departmental document protected in the public interest from disclosure, and outside the scope of s. 63 (g) of the Act. "All other documents" in s. 63 (g) must be read ejusdem generis; they are statutory official documents, documents inter partes, and documents which when transmitted to the court shall be such as will support the position that the matter shall thereupon begin to be an action in the court ready for trial. The report of the inspector does not qualify under any of those three classifications. The report had no more official status than any other correspondence on

the file, and if it should have been transmitted, then so should the whole departmental file. (b) The respondents' proper way of testing whether the appellant was bound to transmit or to disclose the report was by interlocutory application in the Exchequer Court. (c) In any event a failure by the appellant to comply with s. 63 could not invalidate decisions previously made under s. 6, sub-s. 2.

Gahan followed. It is not possible for the court in this case to say that there was no material before the Minister on which the discretion under s. 6, sub-s. 2, could be exercised in a judicial manner. We do not know what information was before him, or the grounds of his decision. There is nothing in the Act, however, requiring him to hold a hearing, or to deliver something in the nature of a pleading informing the other party of the facts. His duty under the statute was to give an opportunity to the taxpayer to make representations which might be regarded as material, and here full notice was given to the respondents that it was proposed to consider exercising discretion under s. 6, sub-s. 2, and full opportunity was given to make any representations material to the question whether that discretion should be exercised. It is not permissible to assume that there has been some misrepresentation of facts to the Minister by one of his subordinates. If there is any material on which the Minister could so exercise his discretion, and it is submitted that there is, the court would be slow to say that he did not properly apply his mind to his duties and that his determination was not a valid one.

H. R. Bray K.C. (of the Canadian Bar) and *Gerald Gardiner* for the respondents. On the main point, it is submitted that the view of Rinfret C.J. that s. 6, sub-s. 1 (i), and s. 6, sub-s. 2, are mutually exclusive, is correct. He said, and it is our contention, that "s. 6, sub-s. 1 (i), does apply to the case "under consideration, for the appellants [the present "respondents] . . . must be taken not to be controlled "directly or indirectly by the English company. It is only "when the Canadian company is controlled by the company "without Canada that a deduction of the sums charged by "the company outside of Canada for 'services' shall not be "allowed as a deduction . . . I cannot see how the Minister "can act under s. 6, sub-s. 2, in contravention of what is "prescribed under s. 6, sub-s. 1 (i). I cannot find any good "reason for excluding s. 6, sub-s. 1 (i), as the learned trial "judge has done, and to my mind, that would be sufficient "to allow the appeal, because the sums paid by the appellants

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“to the English company in respect of services were not paid
 “to a company controlling the appellants, and it is of no
 “concern to inquire what services were supplied, how
 “frequently they were supplied or how important they were.” (1)

When the Minister is performing the purely administrative act of assessing the taxpayer's income, even to the point of exercising his discretion whenever it is allowed, he can get his information wherever he likes, and, if the taxpayer allows it to go unchallenged, that is an end of the matter. If, however, the taxpayer brings it to the notice of the Minister that he is dissatisfied and appeals to him under ss. 58 and 59, then, if not before, the Minister is performing a quasi-judicial act, and must then place at the taxpayer's disposal the relevant facts prejudicial to his contention. When he assumed his quasi-judicial capacity—when he was challenged under ss. 58 and 59—he should then have given us this extra information so that we could meet it, and he failed to do so. Section 59 imposes a duty, “the Minister ‘shall’” When it comes to a matter such as this—an appeal from the act of that very deputy—it would take far more intractable language than is used here to permit that same person to hear an appeal from himself, which he did. That was objected to throughout this case. It has been assumed by the appellant here that this right of appeal by the taxpayer is a limited one. It is submitted that in this instance we are given a general right of appeal, not only to the Minister from the act of his deputy, but to the Exchequer Court, and that it is the duty of the court under the statute to examine into the facts and, if necessary, to supplant the Minister's discretion by its own. The Chief Justice expressly, and the other three judges in effect, said that these payments were valid lawful payments and should have been allowed. As to the form of the order, what is meant by the judgment of the Supreme Court is that the assessment must go back to the Minister for the purpose of arriving at the proper assessment after allowing as a deduction the payments that were made. The Supreme Court itself could not do that, as it has no accounting authority.

Varcoe K.C. replied. The Minister exercised his discretion under s. 6, sub-s. 2, on relevant material, and on the authorities there is no room for any action by the court in reviewing the exercise of that discretion: *The Queen v. Adamson* (2).

December 11. The judgment of their Lordships was delivered
 (1) [1946] S. C. R. (Can.) 145. (2) (1876) 1 Q. B. D. 201, 206.

by LORD GREENE M.R. This appeal relates to three assessments made against the respondent company, Wrights' Canadian Ropes, Ltd., under the Income War Tax Act and the Excess Profits Tax Act of the Dominion of Canada for the respondents' fiscal years 1940, 1941 and 1942. The questions in issue are the same for all three years and the relevant statutory provisions are the same under both Acts. It is accordingly sufficient to refer to the Income War Tax Act alone. The only matter on which the assessments were challenged by the respondents was the disallowance by the appellant of part of certain sums which had admittedly been paid in the years in question by the respondents to an English company, Wrights' Ropes, Ltd., of Birmingham, by way of commission under an existing contract, dated September 12, 1935. These sums were claimed by the respondents to be properly deductible in computing the amount of their taxable income.

The contract, by cl. 1, was expressed to supersede an earlier contract, dated May 19, 1931. The parties to both contracts were Wrights' Ropes, Ltd. (referred to as "Wrights"), another English company named Charles Hirst & Sons, Ltd. (referred to as "Hirsts") and the respondents, whose name at the date of the earlier contract was William Cooke & Co. (Canada), Ltd. The earlier contract provided for the assignment to the respondents of the business and sales agencies of Wrights in Western Canada and for the performance by Wrights of certain services for the benefit of the respondents together with a restrictive covenant by Wrights against the sale by Wrights of wire rope in Western Canada. The consideration payable by the respondents to Wrights for the latter's performance of its obligations was to be a commission at the rate of five per cent. on all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the respondents since March 1, 1931. While this earlier contract was still current the later agreement of September 12, 1935 (which was expressed to supersede it), was entered into, and by cl. 8 it was to continue until determined by twelve calendar months' notice in writing given by any party to the other parties. Apart from the provision for the transfer by Wrights of its business and sales agencies in Western Canada (which had already been carried into effect) the terms of this contract were substantially of the same character as those of the earlier contract. There was a similar restrictive covenant by Wrights (cl. 2 (a)) and the services to be performed by Wrights for the

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benefit of the respondents were substantially the same as before. These services may be briefly summarized as follows : under cl. 2 (e) Wrights were to act as technical advisers to the respondents in the purchase, installation and operation of machinery for the manufacture of wire ropes and in the design and manufacture of wire ropes ; under cl. 2 (f) Wrights were to furnish to the respondents all information, whether of a technical or a commercial nature, known to them which might be helpful in the manufacture and sale of wire ropes, and generally to place at the disposal of the respondents the accumulated experience of Wrights and the benefit of their future experiments and investigations. Wrights were also to supply copies of catalogues and advertising matter ; under cl. 2 (g) Wrights were to supervise the supply of wire to the respondents by Hirsts who (save when unwilling or unable to supply) were by cl. 3 to be the exclusive suppliers to the respondents of wire for use by the respondents in the manufacture of wire rope. By cl. 5 the same commission at the rate of five per cent. was payable to Wrights by the respondents as had been payable under the earlier agreement.

In the respondents' profit and loss accounts attached to their returns under the Income War Tax Act and the Excess Profits Tax Act the sums paid in respect of this commission were set out as follows : For 1940 \$17,381.94, for 1941 \$29,325.85 and for 1942 \$39,480.91. It is admitted that these sums were duly payable by the respondents under the contract and that they were in fact paid. Nevertheless, the respondents, acting according to what their Lordships were informed by counsel was an arrangement made with the Revenue in previous years, voluntarily offered in their returns to submit to a reduction for tax purposes of the figure of five per cent. to that of three-and-a-half per cent. so that the sums claimed as deductions in arriving at their taxable income for the years in question were reduced as follows : in 1940 by \$5,214.58, in 1941 by \$8,797.75 and in 1942 by \$11,844.27. In their Lordships' opinion this offer has no relevance to the questions which fall for decision and cannot be used in any way to the prejudice of the respondents in this appeal. The offer was not accepted by the appellant and the respondents are accordingly entitled to stand on their strict rights.

Assessments in respect of the three years in question were made on May 10, 1944. In these assessments the only sums allowed as deductions for the purpose of arriving at the net

taxable income of the respondents in respect of the commission paid by the respondents to Wrights were the sum of \$7,500 for each of the three years, that is to say, for the year 1940 \$9,881.94 out of \$17,381.94 actually paid was disallowed, for the year 1941 \$21,825.85 out of \$29,325.85 actually paid was disallowed and for the year 1942 \$31,980.91 out of \$39,480.91 actually paid was disallowed. In making these disallowances the appellant purported to act under s. 6, sub-s. 2, of the Income War Tax Act, which provides (in reference to deductions in computing assessable profits) as follows: "The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income." It appears from a letter written on August 13, 1943, by the Inspector of Income Tax to the respondents (printed on p. 34 of the Record) that of the various grounds for disallowance specified in the sub-section the particular ground on which the Minister purported to act was that the commissions paid were "in excess of what is reasonable for the business." No question therefore arises as to the payments not having been "normal" for the business, nor as to their having "unduly or artificially reduced the income."

Their Lordships find it convenient at this point to dispose of two arguments which found favour in some of the judgments of the Supreme Court and were repeated before the Board. It was said in the first place that the payments in question were not "expenses" within the meaning of the sub-section since they were payments made under a valid contract as consideration for the contractual benefits thereby conferred. The word "expense" as used in the sub-section has, it was said, a narrow meaning and does not extend to payments of this character. Their Lordships are unable to accept this argument. It appears to them that the word "expense" as used in the sub-section has a quite general meaning and is wide enough to cover any expenditure by the taxpayer whether made under or as a condition of obtaining a contract or otherwise. There is, in the opinion of their Lordships, no justification for drawing a distinction between different kinds of contractual payment, and this view is confirmed by the use of the word "expense" in other parts of s. 6 where its meaning can only

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be of a general nature. It is sufficient in this connexion to refer to sub-ss. 4 and 5 of s. 6.

The other of the two arguments to which reference has been made appears at first sight to be more substantial but, in their Lordships' opinion, it also must be rejected. It is said that the payments in question are dealt with exclusively by para. (i.) of sub-s. 1 of s. 6, that on the true construction of that paragraph they must be allowed as deductions, and that the powers of disallowance vested in the Minister under sub-s. 2 do not extend to payments which are thus covered by para. (i.) of sub-s. 1. The relevant words of para. (i.) of sub-s. 1 of s. 6 are as follows: "In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of (i.) any sums charged by any company . . . outside of Canada to a Canadian company . . . in respect of management fees or services . . . irrespective of whether a price or charge is agreed upon or otherwise; but only if the company . . . to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company . . . within or without Canada." The argument was that the sums here in question were of the nature described in the paragraph, that on the true construction of the paragraph sums of this nature are to be allowed as deductions save in the sole case where the required control exists, that on the admitted facts in the present case no such control existed, and that sums thus imperatively directed to be allowed cannot be made the subject-matter of a discretionary disallowance in whole or in part by the Minister under sub-s. 2. Two incidental questions were raised in connexion with this argument. One was whether the required control of the respondents by Wrights existed in fact. As to this, their Lordships are of opinion that the admission signed on behalf of both parties on June 1, 1945 (and printed on page 57 of the Record), to the effect that Wrights held only 49·86 per cent. of the shares of the respondents is conclusive that it did not. The other question was whether the sums in question, payable as they were in respect of a variety of considerations, including the restrictive covenant by Wrights, could be said to be of the nature specified in para. (i.) of sub-s. 1. Their Lordships do not find it necessary to express an opinion on this question since in their view the main argument fails. Their reasons may be shortly stated. The disallowance prescribed by s. 6, sub-s. 1, (i.), is compulsory

(save in so far as a provision at the end of the paragraph allows the Minister to mitigate it in a limited class of case), and does not come into operation as the result of a determination by the Minister as is the case where disallowance is effected under sub-s. 2. The direction in para. (i.) beginning with the words "but only" does no more than lay down the limits within which this compulsory disallowance is to operate; it cannot in their Lordships' opinion be construed as meaning that in cases not falling within those limits no disallowance is to take place under sub-s. 2. There does not appear to their Lordships to be any real difficulty in reconciling a provision which says that the compulsory disallowance is only to take place in certain stated circumstances with the provision in sub-s. 2 which provides in quite general terms for a disallowance to be effected in different circumstances and in a different manner, namely, as the result of a determination by the Minister. The language is insufficient to require the two provisions to be read as mutually exclusive, as is in effect contended by the respondents.

There is one more argument advanced on behalf of the respondents which can conveniently be dealt with before coming to the substantial question in the case. On May 29, 1944, the respondents served on the appellant a notice of appeal against the assessments under s. 58 of the Income War Tax Act. Section 59 of the Act provides that notices of appeal are to be considered by "the Minister" who is to "affirm" or amend the assessment appealed against." Under s. 75, sub-s. 2, of the Act the Minister is empowered by regulation to authorize the Commissioner of Income Tax "to exercise" such of the powers conferred by this Act upon the Minister, "as may, in the opinion of the Minister, be conveniently" exercised by the Commissioner of Income Tax." On August 8, 1940, the appellant made a regulation authorizing the Commissioner of Income Tax to exercise without exception the powers conferred on the Minister by the Act. At the date of this regulation Mr. C. Fraser Elliott K.C. was the Commissioner of Income Tax. Under s. 1 of ch. 24 of the Statutes of 1943-44 power was given to the Governor in Council to appoint a "Deputy Minister of National Revenue" for Taxation" and that title was to be substituted for the title "Commissioner of Income Tax." Mr. Fraser Elliott was duly appointed Deputy Minister of National Revenue for Taxation. It was Mr. Elliott, as the appellant's delegate, who

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made the disallowances complained of and signed the assessments, and it was he who dealt with and rejected the appeal of the respondents under s. 59. It was contended on behalf of the respondents that although the power to make disallowances under s. 6, sub-s. 2, and to sign assessments could validly be delegated by the Minister, it was not competent to him to delegate the duty to consider appeals under s. 59, and that accordingly the appeal of the respondents under that section had never been considered as the section requires. This argument is based on a suggested distinction between powers and duties which their Lordships, so far as the present case is concerned, are unable to accept. The distinction, if well founded, would mean that the Minister himself would be bound to hear all income tax and excess profits tax appeals, a burden which it is not to be supposed that the legislature can have intended to place on his shoulders. Indeed, the making of assessments is as much a matter of duty as the hearing of an appeal, and the argument that duties as distinct from powers are to be excluded from the right to delegate given by s. 75, sub-s. 2, would, if accepted, render that right of little practical value.

Their Lordships will now proceed to deal with the main question which is in issue in the appeal. By notice dated September 26, 1944, the decision of the appellant dismissing their appeal was communicated to the respondents pursuant to s. 59 of the Income War Tax Act. The notice stated that the decision was "based on the facts presently before the "Minister." What these facts were was stated in unambiguous language by the Deputy Minister in his examination for discovery in the action which ensued. They were "the "financial statements of the company for each of the years "concerned, the income tax returns for the company and all "documents attached to these two documents." This clearly included copies of the two agreements mentioned, which had been forwarded to the Inspector by the respondents on September 8, 1945. In addition, the Deputy Minister had before him a report by the Inspector of Taxes to the Minister. On receipt of the notice of dismissal of their appeal the respondents served a notice of dissatisfaction pursuant to s. 60 of the Income War Tax Act. The Minister served a reply under s. 62 and transmitted certain documents to the registrar of the Exchequer Court under s. 63. Thereupon, under sub-s. 2 of that section the matter was to be "deemed to be an

"action in the said court ready for trial or hearing." The appeal was heard by Cameron J. in the Exchequer Court. The only witness called was Mr. Joseph Gordon Chutter, the Managing Director of the respondents. Cameron J. dismissed the appeal. The respondents thereupon appealed to the Supreme Court who, by a majority (diss. Kerwin J.), allowed the appeal, with costs. The formal order directed the assessments to be "referred back to the Minister of National Revenue under the provisions of s. 65, sub-s. 2, of the Income War Tax Act, to be dealt with by him in accordance with the reasons for judgment of the majority of the members of this Court." Their Lordships will have some comments to make on this order later in this judgment.

In the reasons for judgment in the Supreme Court and in the argument before their Lordships' Board considerable discussion took place with regard to the report made by the Inspector of Income Tax to the Minister. The contents of this document were not communicated to the respondents at any stage, and when on his examination for discovery Mr. Elliott was asked by counsel for the respondents to produce it, he declined to do so. It was not produced, nor was the nature of its contents disclosed, either before the Supreme Court or before their Lordships' Board. The non-production of the document was put forward as a ground for allowing the appeal in the Supreme Court, and was relied on by counsel for the respondents in the present appeal. It was argued that the report ought to have been filed in the Exchequer Court under para. (g) of s. 63, sub-s. 1, of the Act, which includes among the documents to be filed by the Minister "all other documents and papers relative to the assessment under appeal." Their Lordships do not find it necessary to express a concluded opinion on the question whether this language is sufficiently wide to cover what would normally be regarded as a confidential communication made to a Minister by one of his subordinates and, as such, privileged from production. If, indeed, para. (g) did cover the report the proper method to secure its production before the Exchequer Court would have been by interlocutory application to that court. No such application, however, was made and the non-production of the report could not by itself assist the respondents.

Their Lordships now return to a consideration of the language of s. 6, sub-s. 2. They cannot help thinking that some confusion has been caused throughout the history of this controversy

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by the phrase contained in the sub-section "in his discretion." The word "discretion" is in truth scarcely appropriate in the context, since what the Minister is required to do before he can make a disallowance is to "determine" that an expense is in excess of "what is reasonable or normal for the business" "carried on by the taxpayer." The reference to "discretion" in this context does not, in the opinion of their Lordships, mean more than that the Minister is the judge of what is reasonable or normal. If the matter had stood there, and there had been no right of appeal against the decision of the Minister, the position would have been different from what it is. But in contrast to cases arising under sub-ss. 3 and 4 of s. 6, where the decision of the Minister is to be "final and conclusive," a right of appeal to the Exchequer Court is given, and the appeal is to be regarded as an action in that court. This right of appeal must, in their Lordships' opinion, have been intended by the legislature to be an effective right. This involves the consequence that the court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless, the limits within which the court is entitled to interfere are, in their Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield* (1), he must act "according to the rules of reason and justice, not "according to private opinion . . . according to law, and "not humour. It is to be, not arbitrary, vague and fanciful, "but legal and regular." Again in a case under another provision of this very s. 6 (s. 6, sub-s. 1), where a discretion to fix the amount to be allowed for depreciation is given to the Minister, Lord Thankerton in delivering the judgment of the Board said "The Minister has a duty to fix a reasonable "amount in respect of that allowance and, so far from the "decision of the Minister being purely administrative and

(1) [1891] A C. 173, 179.

“ final, a right of appeal is conferred on a dissatisfied taxpayer ;
 “ but it is equally clear that the court would not interfere
 “ with the decision unless—as Davis J. states—‘ it was
 “ ‘ manifestly against sound and fundamental principles.’ ”
 (*Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National
 Revenue* (1).)

In the present case the Minister’s decision is attacked on the ground that there was before him no material on which he, as a reasonable man, could determine that any part of the commissions in question was in excess of what was reasonable for the business carried on by the respondents. The ground of attack is different from that which was successful in the *Pioneer Laundry* case (1). There the Minister had given a reason for his decision which was in law incapable of supporting it, whereas in the present case no reason was given by the Minister, although certain suggestions were made in the hearing before their Lordships by counsel, as will presently appear. Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under s. 6, sub-s. 2. But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer’s appeal. To hold otherwise would mean that the Minister could in every case, or, at least, the great majority of cases, render the right of appeal given by the statute completely nugatory. The court is, in their Lordships’ opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the sub-section made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision.

So far as the evidence goes the only material before the appellant consisted of the documents mentioned by Mr. Fraser Elliott in his examination. All these documents, with the

(1) [1940] A. C. 127, 136.

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exception of the report of the Inspector, were before the courts in Canada. Their Lordships are unable to find in any of these documents any material on which the determination of the appellant could lawfully be founded. Counsel for the appellant, when invited to point to anything in these documents which could justify the disallowances, referred to two matters only, namely, that the receipts of the respondents on which the commission was paid were on a rapidly rising scale, due, no doubt, to war contracts; and that the rise in the amounts paid away in commission was not accompanied by a corresponding rise in the net profits of the company. In their Lordships' opinion neither of these suggested reasons affords any support for a finding that the commissions paid in these years were in excess of what was reasonable for the business carried on by the respondents. The contract was admittedly a bona fide one. It is not to be assumed, nor is it now suggested, that the commissions were other than reasonable having regard to the benefits obtained by the respondents under the contract. The mere fact, therefore, that as the receipts increased the commission automatically increased can provide no ground for saying that the increase was unreasonable. It was due to nothing but the operation of the terms of the contract which, *ex hypothesi*, were reasonable terms. The other reason suggested by counsel is equally without substance. The fact that the net profits of the respondents were not in step with the rising amounts of the commission may have been due to a variety of causes and can have no possible bearing on the reasonableness of the commission payments.

So far, therefore, as these documents are concerned their Lordships cannot find any material which could have justified any disallowance. But it was suggested that there may have been other facts before the Minister which justified him in taking the course that he did and, in particular, it is said that the report of the Inspector may have contained the requisite material. Their Lordships cannot accept this argument. The Appellant has not chosen to produce any evidence as to these alleged matters, and their Lordships are quite unable to assume in the appellant's favour that he had before him sufficient facts to support his determination when he neither condescends to state what those facts were nor attempts to prove that any such facts were in truth before him. The only inference which, in their Lordships' opinion, can legitimately be drawn from the available evidence is that, apart from the

documents which were before the court, the Minister had no material before him which influenced his mind in making the determination that he did. If he had in fact had such material it would, in their Lordships' opinion, have been impossible to suppose that he would not have informed the respondents of at least the substance of it when the matter was originally brought before him so as to give the respondents a fair opportunity of meeting the case against them. The contrary supposition would involve that the appellant had come to a decision adverse to the respondents on material of which, so far as he knew, the respondents were completely ignorant, and knowledge of which he deliberately withheld from them.

In their Lordships' opinion, therefore, the Supreme Court was right in allowing the appeal of the present respondents although, as will have appeared, their Lordships' reasons are for the most part different from those that commended themselves to the several members of the Supreme Court. It remains to consider what the proper form of order should be. The order of the Supreme Court referred the matter back to the Minister under s. 65, sub-s. 2, of the Income War Tax Act. Their Lordships do not think that this reference to s. 65, sub-s. 2, was appropriate. The power conferred on the court under that sub-section to "refer the matter back to the "Minister for further consideration" is, in their Lordships' opinion, limited to cases of the kind referred to in sub-s. 1 of s. 65, namely, where matters not referred to in the notice of appeal or notice of dissatisfaction are admitted by the court. In such cases a reference back to the Minister might obviously be an appropriate procedure. Where, however, as in the present case, the issues are fought out and the taxpayer is successful on his appeal, the sub-section does not, in their Lordships' opinion, apply. A fortiori it cannot apply in the manner and with the consequences contended for by counsel for the appellant in the present case. They endeavoured to interpret the order as meaning that it would be open to the Minister to start as it were *de novo* and reconsider the whole matter of disallowance, with power to come to the same conclusion as before, or a different conclusion, on the same or different material. This, in their Lordships' opinion, would plainly be inadmissible. The issues have been fought out by action in the courts and the appeal of the respondents was in terms allowed by the Supreme Court. The view submitted by the appellant, if correct, would give the Minister a second

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opportunity of making a determination unfavourable to the respondents and thus depriving them of the fruits of their victory. On consideration of the reasons for judgment of the Supreme Court their Lordships are of opinion that in allowing the appeal it was intended to decide that the disallowances complained of were to be set aside once and for all and that the reason for referring the matter back to the Minister was merely to enable him to adjust the assessments in accordance with this decision. That, in the opinion of their Lordships, was the correct order to make, but the reference back to the Minister for this purpose could and should have been made under the inherent jurisdiction of the court and not under s. 65, sub-s. 2. It cannot be doubted that when the court has answered a question submitted to it in such a way as to necessitate a revision of the assessment it has inherent jurisdiction to send the assessment back for that purpose instead of being bound itself to make the consequential alterations. The formal order of the Supreme Court should, in their Lordships' opinion, be varied by directing that the assessments be referred back to the Minister (without any reference to s. 65, sub-s. 2) for an adjustment of the figures consequential on the allowance of the respondents' appeal to the Supreme Court.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed, but that the order of the Supreme Court should be modified in the manner above indicated. The appellant must pay the costs of this appeal.

Solicitors for appellant : *Charles Russell & Co.*

Solicitors for respondents : *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Appeal to Privy Council—Dominion legislation abolishing all appeals from all Canadian courts, Provincial and Dominion, civil and criminal—Constitutional validity—Intra vires—Bill 9 (introduced in 1939), entitled “An Act to amend the Supreme Court Act” of Canada—Supreme Court Act, R. S. C. 1927, c. 35, s. 54—British North America Act, 1867 (30 & 31 Vict., c. 3), ss. 91, 92, 101, 129—Statute of Westminster, 1931 (22 Geo. 5, c. 4), ss. 2, 3, 4, 7.

By Bill 9, introduced into the Canadian Parliament in 1939 and entitled “An Act to amend the Supreme Court Act of Canada,” it was provided that “The Supreme Court shall have, hold and “exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the court “shall, in all cases, be final and conclusive,” and that “Notwithstanding any royal prerogative or anything contained in any Act “of Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of “Canada or any other statute or law, no appeal shall lie or be “brought from any court . . . within Canada to any court of “appeal, tribunal or authority by which, in the United Kingdom, “appeals or petitions to His Majesty in Council may be ordered “to be heard.” The Bill further provided that the Judicial Committee Acts, 1833 and 1844, and all orders, rules or regulations made thereunder were repealed in so far as they were part of the law of Canada :—

Held, that Bill 9 was wholly intra vires of the Parliament of Canada, which, accordingly, was competent to enact in regard both to appeals from the Supreme Court of Canada itself and appeals direct from the provincial courts to His Majesty in Council that the Supreme Court should have “exclusive” and “ultimate” appellate, civil and criminal jurisdiction.

As to appeals from the Supreme Court itself, whereas before the passing of the Statute of Westminster, 1931, the power vested in the Dominion Parliament by s. 101 of the British North America Act, 1867, to establish a general Court of Appeal for Canada was necessarily subject to the prerogative right of His Majesty to grant

* *Present* : LORD JOWITT L.C., VISCOUNT SIMON, LORD MACMILLAN, LORD WRIGHT, LORD GREENE M.R., LORD SIMONDS and LORD GODDARD C.J.

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special leave to appeal therefrom, since that right was not expressly or by necessary intendment excluded, that restriction or fetter on the legislative power of the Dominion had been removed by the Statute of Westminster, and it was accordingly within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court should be ultimate.

As to appeals direct from provincial courts to His Majesty in Council, s. 101 of the British North America Act "read and applied" as prima facie intended to endow the Dominion Parliament with "power to effect high political objects concerning the self-government of the Dominion . . . in the matter of judicature," imported authority to establish a court having supreme and final and exclusive appellate jurisdiction in Canada. Section 101 conferred a legislative power on the Dominion Parliament which by its terms overrode any power conferred by s. 92 of the British North America Act on the provinces or preserved by s. 129 of that Act. The words in s. 101, "notwithstanding anything in this Act," vested in the Dominion a plenary authority to legislate in regard to appellate jurisdiction which was only qualified by that which lay outside the Act, namely, the sovereign power of the Imperial Parliament. Accordingly, (since the coming into operation of the Statute of Westminster, which gave the Dominion Parliament power to abrogate Imperial Statutes which qualified its attribute of sovereign power by an external constitutional limitation, the authority conferred by s. 101 stood unqualified and absolute.)

Nadan v. The King [1926] A. C. 482, and *Crown Grain Co., Ltd. v. Day* [1908] A. C. 504, referred to.

The decision in *British Coal Corporation v. The King* [1935] A. C. 500, can be supported on grounds which cover not only criminal cases, and not only civil cases falling within the subject-matter of s. 91 of the British North America Act, but also every other case which can be brought before any provincial court in Canada.

Viewing the matter from a wider point of view, it is not consistent with the political conception which is embodied in the British Commonwealth of Nations, that one member of that Commonwealth should be precluded from setting up a supreme court of appeal having a jurisdiction both ultimate and exclusive of any other member. Further, the regulation of appeals is "a prime element in Canadian sovereignty" which would be impaired if at the will of its citizens recourse could be had to a tribunal in the constitution of which it had no voice. It would be alien to the spirit with which the preamble to the Statute of Westminster is instinct to concede anything less than the widest amplitude of power to the Dominion under s. 101 of the British North America Act. That the law should be one and the same for all its citizens was only attainable if s. 101 now authorized the establishment of a court with final and exclusive appellate jurisdiction.

Judgment of the Supreme Court of Canada [1940] S. C. R. (Can.) 49, affirmed.

APPEAL (No. 26 of 1940), by special leave, from a majority

judgment of the Supreme Court of Canada (January 19, 1940) on a reference by the Governor-General in Council of a question relative to the authority of the Parliament of Canada to amend the Supreme Court Act so as to give the Supreme Court of Canada exclusive ultimate appellate civil and criminal jurisdiction within and for Canada.

The question referred to the Supreme Court was : " Is Bill 9, " entitled ' An Act to amend the Supreme Court Act,' or any of " the provisions thereof, and in what particular or particulars, " or to what extent, intra vires of the Parliament of Canada ? " Bill 9, of the Fourth Session of the Eighteenth Parliament of Canada, provided as follows :—

" 1. Section 54 of the Supreme Court Act, ch. 35 of the " Revised Statutes of Canada, 1927, is repealed and the follow- " ing substituted therefor :—

" 54. (1.) The Supreme Court shall have, hold and exercise " exclusive ultimate appellate civil and criminal jurisdiction " within and for Canada ; and the judgment of the court " shall, in all cases, be final and conclusive."

" (2.) Notwithstanding any royal prerogative or anything " contained in any Act of the Parliament of the United " Kingdom or any Act of the Parliament of Canada or any " Act of the legislature of any province of Canada or any " other statute or law, no appeal shall lie or be brought from " any court now or hereafter established within Canada to " any court of appeal, tribunal or authority by which, in the " United Kingdom, appeals or petitions to His Majesty in " Council may be ordered to be heard.

" (3.) The Judicial Committee Act, 1833, ch. 41 of the " statutes of the United Kingdom of Great Britain and " Ireland, 1833, and The Judicial Committee Act, 1844, " ch. 69 of the statutes of the United Kingdom of Great " Britain and Ireland, 1844, and all orders, rules or " regulations made under the said Acts are hereby repealed " in so far as the same are part of the law of Canada."

" 2. Nothing in this Act shall affect any application for " special leave to appeal or any appeal to His Majesty in Council " made or pending at the date of the coming into force of this " Act.

" 3. This Act shall come into force upon a date to be fixed " by proclamation of the Governor in Council published in the " Canada Gazette."

In the Supreme Court of Canada, Duff C.J., Rinfret, Kerwin

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and Hudson JJ. were of opinion that the Parliament of Canada was competent to enact the Bill referred in its entirety. Crocket J. held that the Bill was wholly ultra vires of the Parliament of Canada. Davis J. was of opinion that the Bill would be intra vires the Dominion Parliament if it was amended to provide that nothing therein should alter or affect the rights of any province in respect of any action or other civil proceedings commenced in any provincial court and solely concerned with some subject-matter within the exclusive legislative competence of the province.

1946. Oct. 23, 25, 28, 29, 31, Nov. 1. *C. R. Magone K.C.* (of the Canadian Bar) for the appellant the Attorney-General for Ontario. Bill 9 falls within the exclusive powers committed to the provincial legislatures under s. 92 of the British North America Act, 1867, and particularly within heads 13 and 14, which are respectively, "property and civil rights in the province," and "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." The Dominion relies on the powers under s. 91 and s. 101 of the Act of 1867, the former providing that the Parliament of Canada may make laws "for the peace, order, and good government of Canada, in relation to all matters not . . . assigned exclusively to the legislatures of the provinces," and also in relation to certain enumerated exclusive subject-matters. Section 101 provided that "the Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada" The decision of the Judicial Committee in *British Coal Corporation v. The King* (1) was based on the powers of Parliament to legislate in relation to one of the specific heads under s. 91 of the Act of 1867, namely, head 27, "the criminal law . . . including the procedure in criminal matters." [Reference was also made to *Nadan v. The King* (2).] Section 101 has been held to include the power to provide for appeals to the court set up thereunder in matters coming within the classes of subjects enumerated in s. 92, but this does not include the power to limit appeals from that court to His Majesty in Council in matters coming within the classes

(1) [1935] A. C. 500.

(2) [1926] A. C. 482.

of subjects in s. 92 : *Crown Grain Co., Ltd. v. Day* (1). Bill 9 is primarily in relation to the administration of justice in the province. Admittedly, before the Statute of Westminster, 1931, there was no power in the Dominion to enact Bill 9, and since there has been no redistribution of legislative powers by the Statute of Westminster, Parliament cannot now pass the Bill. The words of s. 7, sub-s. 1, of the Statute of Westminster are "nothing in this Act shall be deemed to apply to the repeal, "amendment or alteration of the British North America Acts, "1867 to 1930" ; the words "repeal or amendment" cover the whole field of legislative action that could be taken with regard to any statute. The Statute of Westminster was also a pact with the provinces ; their powers were strictly preserved, and it must have been the intention that such a Bill as this, which before the Statute of 1931 could not have been enacted by the Dominion Parliament, should not be enacted after it was passed. Further, sub-s. 3 of s. 7 of the Statute of Westminster provided that the powers conferred by that Act on the Parliament of Canada or on the legislatures of the provinces should be restricted to the enactment of laws in relation to matters within the competency of the respective legislatures. The attempt on the part of the Dominion Parliament in 1937 to enlarge its legislative power under the Statute of 1931 was emphatically denied in *Attorney-General for Canada v. Attorney-General for Ontario* (2). The only new power which the Dominion obtained under the Statute of Westminster was to legislate extra-territorially on a subject on which, before the Statute of Westminster was passed, it had power to legislate. My main contention is that, since the Act of 1931, full power now exists in the provincial legislatures to abrogate the right to appeal to the Privy Council as of right and also the prerogative right.

The long-standing right, provided by Acts of the Ontario legislature, to bring appeals as of right to the Privy Council, still exists in the provincial legislature, and, further, since the Statute of Westminster the provinces have the added right of abolishing the prerogative appeal. The right to legislate with respect to appeals to the Privy Council in civil cases is within the exclusive jurisdiction of the provincial legislatures : *McBride v. Ontario Jockey Club, Ltd.* (3) ; *Beauharnois Light, Heat & Power Co., Ltd. v. Hydro-Electric Power Commission of*

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(1) [1908] A. C. 504.

(3) (1925) 58 O. L. R. 267.

(2) [1937] A. C. 326, 354.

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Ontario (1) ; *Re Boulton, & Toronto Terminals Ry. Co., Ltd.* (2) ; *Davis v. Shaughnessy* (3). This Board has recognized and acted on these provincial statutes for so many years that it must be taken that the power to legislate on appeals to this Board as of right is a power in relation to the administration of justice in the province, and that, therefore, one must find more exact words in s. 101 to permit the Dominion to say that there shall be no appeal from the provincial courts to the Privy Council. In connexion with both appeals—as of right and prerogative—all that is required to abolish effectually both classes of appeal is for the province to repeal the Privy Council Acts of 1833 and 1844. The power under s. 101 to constitute, organize and maintain a general court of appeal for Canada does not give the Dominion Parliament power to say that there shall be no appeal from that court to the Privy Council. Acting under the powers in s. 91, the Dominion might abolish appeals in relation to one of the subjects over which it has legislative jurisdiction, e.g., “criminal law,” as in the *British Coal Corporation* case (4), and “bankruptcy and insolvency,” as in *Cushing v. Dupuy* (5), but the limitation in s. 101, is under “constitution, organization “and maintenance,” words not wide enough to permit the Parliament of Canada to abolish appeals from the Supreme Court to the Judicial Committee, and certainly not wide enough to permit it to interfere with appeals direct from provincial courts to the Judicial Committee : *Consolidated Distilleries, Ltd. v. Consolidated Exporters Corp'n., Ltd.* (6). When there is an appeal before the Supreme Court of Canada from one of the provinces, that is in relation to the administration of justice in the province. The royal prerogative exercised by way of special leave to appeal to His Majesty in Council is merged in the Judicial Committee Acts, 1833 and 1844, and there is now no prerogative to admit appeals apart from the statutes, which the provincial legislature may now repeal in so far as they affect provincial subject-matters : *Moore v. Attorney-General for Irish Free State* (7) ; *De Keyser's Royal Hotel, Ltd. v. The King* (8) ; *British Coal Corporation v. The King* (4). The history of the authorities before the enactment of the Colonial Laws Validity Act, 1865, indicates that the legislatures of the

(1) [1937] O. R. 847.

(2) [1933] O. R. 816.

(3) [1932] A. C. 106, 111.

(4) [1935] A. C. 500.

(5) (1880) 5 App. Cas. 409, 416.

(6) [1930] S. C. R. (Can.) 531.

(7) [1935] A. C. 484, 499.

(8) [1919] 2 Ch. 197, 216 ;

[1920] A. C. 508, 526.

Colonies had jurisdiction to enact laws affecting the royal prerogative to admit appeals to the Privy Council : *Cuvillier v. Aylwin* (1). After the Act of 1865 the authority of a colonial legislature to limit the prerogative appeal was discussed in *Reg. v. Bertrand* (2) and *Cushing v. Dupuy* (3). It is submitted that since the Statute of Westminster the provinces are back to the position before the Colonial Laws Validity Act. The rationes decidendi of *Nadan v. The King* (4) and *Richelieu & Ontario Navigation Co. v. Owners of ss. Cape Breton* (5) are the same. Lastly, under the guise of legislating with respect to the institution of a superior court the Dominion is attempting to make laws in relation to appeals in civil cases, and under s. 94 of the British North America Act such a law can only operate if brought into force by the legislature of the province.

Summing up, the Parliament of Canada, having constituted a general court of appeal under the power given by s. 101, has exhausted its powers ; that power under s. 101 does not include the power to say that there shall be no appeal to the Judicial Committee in exercise of the royal prerogative ; in any case, that power does not carry with it the power to permit Parliament to abolish either appeals as of right or appeals in the exercise of the prerogative from the provincial courts. Granted that the decision in *Nadan's* case (4) is based on two grounds—repugnancy and lack of extra-territorial powers—the Statute of Westminster empowers the provincial legislatures to enact a law which is repugnant to an Act of the Imperial Parliament and to repeal it so far as it was part of the law of the province, and that specific enactment carries with it the right in the Ontario legislature to affect appeals, both as of right and prerogative.

Barton K.C. and *Gahan* for the appellant the Attorney-General for British Columbia. Bill 9 is ultra vires, first, because it falls within a subject-matter allotted to the province under s. 92 (14.), secondly, because it is not within any of the specifically enumerated heads of s. 91, and thirdly, it is not covered by s. 101. The Statute of Westminster cannot add or take away anything from the actual division of powers between Dominion and province ; if the Dominion did not possess the power to pass this Bill before the Act of 1931, it is not given to

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(1) (1832) 2 Knapp 72, 78.

(4) [1926] A. C. 482.

(2) (1867) L. R. 1 P. C. 520, 529.

(5) [1907] A. C. 112.

(3) 5 App. Cas. 409, 416.

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it merely by the fact that its laws can now have extra-territorial effect. The general power of the Dominion to legislate in respect of "peace, order and good government" is confined to subject-matters not falling within the exclusive legislative competence of the provinces under s. 92. The present matter is within the provincial sphere, and it is only in cases of emergency that the Dominion is permitted to legislate in respect of what would otherwise have been a provincial subject-matter. It has been held that the regulation of the right of appeal is a provincial matter; the province can say that there shall be no appeal from provincial decisions to the Judicial Committee because that is "administration of justice in the "province"—words as wide as can be used. Had it been intended to endow the Dominion legislature with power to limit or take away the existing right of appeal from provincial courts to the Judicial Committee, there would have been some explicit and clear words to that effect, and it is impossible to read such an implied intention into the words of s. 101. If the words "constitution, maintenance and organization" in s. 101 confer power to say that there shall be no appeal to the Judicial Committee, the power is also given to the province by s. 92 (14.), where the same words are used. Further, it is difficult to suppose that there may be inferred from s. 101 a power which would be immediately rendered useless by the operation of the Colonial Laws Validity Act, which was passed two years before the Act of 1867. What s. 101 really means, is, nothing in this Act shall prevent the Parliament of Canada from constituting a Supreme Court, not more. In view of s. 129 of the British North America Act and of the provisions of the Statute of Westminster, the Judicial Committee Acts were not laws which under the Statute of Westminster the Parliament of Canada could interfere with; they were laws applying only to the provinces, and were not in any sense laws of Canada. A Dominion law which purports to repeal these Judicial Committee Acts either directly or indirectly, is invalid; the Statute of Westminster gives to the province only the power to repeal those Acts. The right of appeal to the Privy Council was a safeguard, and, if at the time British Columbia entered into the federation that right could be taken away by the federal Parliament, it is doubtful whether the province would have entered into the federation. There would have been plain, clear and precise words used, and the matter not left one of inference. It is not, therefore, within the power of the Dominion Parlia-

ment to pass Bill 9. [Reference was made to *British Coal Corporation v. The King* (1) and *Croft v. Dunphy* (2).] Bill 9 cannot be severed and should be held ultra vires as a whole.

Gahan for the appellant the Attorney-General for New Brunswick, referred first to the principles of construction: The language of the Constitution Act remains the same, but the changing circumstances may alter the way in which the language operates: *Henrietta Muir Edwards v. Attorney-General for Canada* (3); *Attorney-General for Canada v. Attorney-General for Ontario* (4). The subject-matter of appeals to His Majesty in Council is, and has been treated as, within the provincial sphere, as the administration of justice in the province. The question then arises whether s. 101 by necessary implication alters that provincial power, and, if so, to what extent? It is contended, alternatively, that if the province has not the power to legislate respecting appeals to the Privy Council, then the power does not exist in Canada. Appeals to the Privy Council from New Brunswick have always been regulated by Orders in Council, and their terms indicate that they are concerned in great measure with the administration of justice in the province. Rinfret J. (as he then was) said in his judgment that the words "the administration of justice in the province . . .", restrict the power to the administration "of justice 'in the province'". These words cannot include "matters of appeal from Canadian Courts to the Privy Council 'in London,'" and he cited *Royal Bank of Canada v. The King* (5), *Brassard v. Smith* (6) and *Provincial Treasurer of Alberta v. Kerr* (7). It is submitted that those cases do not support Rinfret J.'s view—they are concerned with questions of taxation. By the same reasoning as is used in *Nadan v. The King* (8), when civil procedure is found to be a matter assigned to the province under s. 92 (14.), then appeal to His Majesty in Council as of right can only be abolished by the province and not by the Dominion. In *British Coal Corporation v. The King* (1) there is an express declaration by the Board that they are dealing only with the way the British North America Act works out in conjunction with the Statute of Westminster in regard to the power that was given to the Dominion in respect of criminal law and procedure. The *British Coal Corporation* case (1) starts from the point where

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(1) [1935] A. C. 500.

(2) [1933] A. C. 156.

(3) [1930] A. C. 124.

(4) [1937] A. C. 326, 349.

(5) [1913] A. C. 283, 298.

(6) [1925] A. C. 371.

(7) [1933] A. C. 710.

(8) [1926] A. C. 482.

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Nadan's case (1) left off. The latter case puts the reason for the invalidity of the impugned enactment—s. 1025 of the Criminal Code—on two grounds, extra-territoriality and repugnancy. As regards both Dominion and province the Statute of Westminster has removed the second of these restrictions, but as regards the province there is not in the Statute of Westminster an express declaration that the province has power to pass extra-territorial legislation. The fact that there is that prohibition in the province, however, does not transfer the right to the Dominion to exercise a power which is still within the provincial field—to legislate on appeals to the Privy Council. In *Cushing v. Dupuy* (2) the Board said that “bankruptcy and “insolvency,” in head 21 of s. 91 of the British North America Act, necessarily gives power to regulate procedure in bankruptcy matters, and treat it as part of civil procedure in the province. With regard to divorce procedure, see *Walker v. Walker* (3) and *Board v. Board* (4); the point is that in matters of divorce, copyright, etc., and every enumerated head, the question of the court which is to administer it and the procedure in that court is a matter for the province under s. 92; it makes no difference what the source of the law administered is, the procedure is a provincial matter.

Since the Statute of Westminster there would be nothing to prevent the legislature in New Brunswick passing an Act to say that, so far as the present effective Order in Council is part of the law of New Brunswick, it shall cease to apply, and that would be effective to abolish the right of appeal to the Privy Council; it would not involve anything taking place outside the province, and would be purely and simply concerned with the administration of justice in the province. As regards the prerogative appeal, it would still be under the administration of justice in the province, but after the Statute of Westminster, regard must be had to the extra-territorial limitation which exists in the case of the province. In *Macleod v. Attorney-General for New South Wales* (5) it was held that the New South Wales Act there in question had to be strictly confined to New South Wales. If the argument is right that the subject-matter of Bill 9 is *prima facie* within provincial powers under head 14 of s. 92, five things follow from it: (a) Each province can legislate on the subject-matter of

(1) [1926] A. C. 482.

(2) 5 App. Cas. 409, 415.

(3) [1919] A. C. 947, 953.

(4) [1919] A. C. 956.

(5) [1891] A. C. 455, 458.

appeals subject to two limitations, (i.) the extra-territorial limitation, and (ii.) the provincial legislation would give way to any Dominion legislation which was enacted under an overriding Dominion power. (b) It follows that the opening words of s. 91—legislation for the peace, order and good government of Canada—cannot avail the Dominion to justify legislation in respect of appeals to the Privy Council. (c) the Dominion cannot derive any help from the enumerated heads of s. 91, unless to the extent only to which those enumerated heads remove the administration of justice from the provincial field, that is to say, in criminal law and in bankruptcy. (d) Bill 9, s. 1, sub-ss. 2 and 3, could not be enacted by the Dominion Parliament, because they would be a power concerned with the administration of justice in the province. (e) There would be no positive power in the Dominion to regulate appeals to His Majesty in Council, it cannot find power in s. 101 to legislate on the general subject of appeals, at any rate, so far as the provincial courts are concerned. Section 101 gives no power to the Dominion Parliament to legislate in relation to appeals to His Majesty in Council.

Emery Beaulieu K.C. (of the Canadian Bar) for the Attorney-General for Quebec, intervening in support of the appellants. In Quebec, as in Ontario, there were created by statute rights of appeal as of right to His Majesty in Council before confederation, rights which have always been maintained, and Bill 9 purports to repeal all that legislation. The matter of appeals to the Privy Council is one relating to the administration of justice in the province, and, consequently, it falls under s. 92 (14.). The primary purpose of these words "in the province" was to safeguard the autonomy of the various provinces; each was entitled to legislate concerning the administration of justice within its own territory, but it could not have been intended to confine their powers to legislating on that subject-matter purely and simply to such procedure as would take place entirely and completely within the territory of the province; there are some which must take place outside: art. 137, Civil Procedure Code; *British Coal Corporation v. The King* (1). Even if that construction is wrong, there is no doubt now that, under the Statute of Westminster, the provinces are completely endowed with the power of regulating appeals to the Privy Council; the right to abolish or regulate appeals to the Privy Council has been granted to the provinces

(1) [1935] A. C. 500, 518.

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whether this is a matter concerning legislation operating extra-territorially or not ; there is no distinction, and the powers have been granted generally to the provinces. Head 14 of s. 92 of the British North America Act read with the Statute of Westminster entitles it to be said that the administration of justice in the province is assigned to the provinces irrespective of any of the provisions of the Colonial Laws Validity Act, and, even if it must include the right to repeal or amend the Judicial Committee Acts of 1833 and 1844.

On the second question, whether assuming that this matter does come within s. 92 (14.) it is removed from the authority of the provincial legislatures by s. 101 of the British North America Act, the argument for the appellants is adopted.

F. P. Varcoe K.C. (of the Canadian Bar) and *Charles Russell* for the respondent the Attorney-General for Canada. The first submission is that Bill 9 is within the powers of the Parliament of Canada under s. 101 of the British North America Act as legislation providing for the constitution of a general court of appeal for Canada, which legislation is valid notwithstanding any other provision in the Act. Two principles should be kept in mind in construing s. 101 ; first, that in such an Act as the British North America Act one would not expect to find spelt out in great detail all the incidental and necessary powers which the legislature is able to exercise—that is in answer to the suggestion that if s. 101 had been intended to assign to Parliament the powers necessary to do what Bill 9 does, there would have been more precise words ; secondly, this Bill should be examined and interpreted in the first instance without reference to any other legislation, such as the Judicial Committee Acts or the Colonial Laws Validity Act, and its meaning should be found within the four corners of the British North America Act. *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co., Ltd.* (1) illustrates that the Dominion Parliament has legislated in connexion with procedure by an Act which overrode a provincial Act which claimed to be justified under s. 92 (14.). The word “general” in s. 101 means that Parliament is enabled to legislate with reference to every appeal—the power extends generally to the provinces, generally to all cases and generally to all laws. The second submission is that Bill 9 is outside the terms of s. 92 of the British North America Act, and, therefore, within the legislative competence of the Dominion Parliament under the introductory part of

s. 91 as legislation for the peace, order and good government of Canada. The pre-confederation statutes do not support the view that there was an appeal as of right, and after 1867 there was no power in the local legislatures carried over to legislate in relation to Privy Council appeals other than what is contained in s. 92 (14.). The authority under s. 92 (14.) to deal with appeals would be confined to such matters as, for example, execution. As was said by Duff C.J. in the present case, "to return to s. 92 (14.). The legislative powers of the provinces "are strictly confined in their ambit by the territorial limits of "the provinces. The matters to which that authority extends "are matters which are local in the provincial sense" (1), and he referred to *Attorney-General for Ontario v. Attorney-General for the Dominion* (2). A further point on s. 92 (14.) is that administration of justice is done by means of courts—it is a wide phrase—and, in so far as that is so, this sub-head is limited to provincial courts; appeals to this Board are by means of a non-provincial court, and, therefore, such legislation is not within s. 92 (14.). Judges merely function as delegates of the Judicial Committee: *The Queen v. Alloo Paroo* (3). It is submitted next that if the legislature of the province has any jurisdiction to legislate in relation to Privy Council appeals, that authority would be overridden by repugnant Dominion legislation on the same question: *Grand Trunk Ry. of Canada v. Attorney-General for Canada* (4). [Reference was also made to the propositions set out in *Attorney-General for Canada v. Attorney-General for British Columbia* (5).] If the Parliament of Canada sets up a general court of appeal under s. 101, it is an essential component of such legislation that the decisions of that court should be binding on all provincial courts, and, if the Dominion legislation contained a provision to that effect, it would be valid legislation in relation to the establishment of a general court of appeal. That is what is done when Parliament prohibits appeals to the Privy Council from those provincial courts. The substance of such legislation is to render the decisions of the Supreme Court of Canada binding on the courts of appeal of the province.

Even if the province has legislative power in relation to appeals, the power of Parliament incidental to s. 101 would enable Parliament to exclude Privy Council appeals—to enact

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(1) [1940] S. C. R. (Can.) 58

(4) [1907] A. C. 65, 67.

(2) [1896] A. C. 348, 359, 365.

(5) [1930] A. C. 111, 118.

(3) (1847) 5 Moo. P. C. 296, 303.

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everything that is contained in Bill 9. The provision in the Bill prohibiting appeals from provincial courts to the Privy Council is part and parcel of a proper and essential component in the legislative power of the Dominion. Lastly, even if the province has legislative power in respect of Privy Council appeals, the power of the Dominion Parliament under "peace, order and good government," to legislate in relation to matters of national concern would enable Parliament to enact this legislation. It may so provide as being a proper provision for the achievement of full national sovereignty and autonomy in Canada, and reliance is placed on such cases as *Attorney-General for Ontario v. Canada Temperance Federation* (1). A topic of frequent discussion in Canada is whether the Dominion is a self-governing autonomous State with all the attributes of government, including a complete and independent system of judicature. If Parliament comes to the conclusion that the public requirements of Canada indicate that the time has come to establish such an independent system of judicature, that is a matter of Dominion concern and not a matter of provincial administration of justice—it transcends matters of provincial concern. If Canada is to have in all respects a constitution comparable with that of the United Kingdom, it does appear that it should have such a court of ultimate and exclusive jurisdiction, binding in all respects and which is binding on itself.

Summarizing: (1.) Section 101 authorizes the Dominion Parliament to enact Bill 9 in toto, as being legislation to establish an exclusive ultimate court of appeal for Canada. (2.) Bill 9 as to any part is not within s. 92 (14.) because of the following:—(a) the legislative power of the province is restricted to matters of a local or private nature in the province, which does not include Privy Council appeals. (b) Administration of justice in the province as to its ordinary meaning is cut down by ss. 101 and 91. (c) The phrase "administration of justice" in the province is cut down by what follows in head (14.), and is restricted to administration by means of courts over which the province has authority. (d) Appeals as of right, so called, are, in substance, identical with prerogative appeals by special leave. (e) The province is without extra-territorial power: *Nadan v. The King* (2); *British Coal Corporation v. The King* (3). (f) The province under the Statute of West-

(1) [1946] A. C. 193.

(2) [1926] A. C. 482.

(3) [1935] A. C. 500.

minster cannot repeal the Orders in Council under the Judicial Committee Acts since the province could not enact equivalent provisions. (3.) Legislation excluding appeals even if in one aspect provincial, in another is federal. (4.) Legislation excluding appeals is necessarily ancillary to s. 101. (5.) Bill 9 is by its inherent nature the concern of Canada as a whole.

Charles Russell followed. The question is simply one of the construction of the British North America Act. The subject-matter of Bill 9 is appeals above the provincial level, and on the true construction of s. 92 (14.) this subject-matter is not within that head, and is, therefore, included in the general head of s. 91. All the heads of s. 92 are matters of a merely local or private nature: *Attorney-General for Ontario v. Attorney-General for the Dominion* (1). The main head of s. 92 is (14.), administration in the province of justice—that is what it means. It would comprise various heads, the establishment of courts, procedure in those courts, execution of decisions, the giving effect to substantive laws, etc. Where one finds the phrase “administration in the province of justice” including questions of courts in the province, that general phrase cannot include non-provincial courts. Further, that general phrase cannot be so construed as to include procedure in civil matters in non-provincial courts. It is abundantly clear that the Judicial Committee of His Majesty’s Privy Council is not a provincial court. Therefore, taking head (14.) of s. 92 alone, the subject-matter of this Bill, which is super-provincial appeals, does not fall within it. Alternatively, that subject-matter is dealt with expressly by s. 101, an overriding provision, which is available and can be used positively as including the subject-matter of this Bill, notwithstanding, as the section says, that it may impinge on what happens in the provinces. The Bill is clearly within the scope of a section establishing one general court of appeal for a geographical area consisting of States, and the main purpose and intention of that section was to achieve uniformity in the application of laws. Bill 9 is *intra vires* the Parliament of Canada.

The Attorneys-General for Manitoba and Saskatchewan filed cases adopting the case of the Attorney-General for Canada.

Magone K.C. replied.

1947. Jan. 13. The judgment of their Lordships was delivered by LORD JOWITT L.C. This appeal is brought from

(1) [1896] A. C. 348.

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the judgment of the Supreme Court of Canada, given on January 19, 1940, on a question which was referred to that court under the provisions of s. 55 of the Supreme Court Act, R. S. C. 1927, ch. 35. From the recitals contained in the order of reference, which was made by the Governor-General in Council on April 21, 1939, it appears that, at the Fourth Session of the Eighteenth Parliament of Canada, Bill 9, entitled "An Act to amend the Supreme Court Act," was introduced and received first reading in the House of Commons on January 23, 1939, and that on April 14 of the same year the debate on the motion for the second reading of the Bill was adjourned in order that steps might be taken to obtain a judicial determination of the legislative competence of the Parliament in Canada to enact the provisions of the said Bill in whole or in part. The following question was accordingly referred to the Supreme Court of Canada for hearing and consideration :

"Is said Bill 9, entitled 'An Act to amend the Supreme Court Act,' or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires of the Parliament of Canada?"

The contents of the Bill, a short, but pregnant, one, must be stated in full. [His Lordship read the provisions of the Bill, and continued :] On January 19, 1940, the Supreme Court certified that the opinions in respect of the question referred to it were as follows :—"By the court : The Parliament of Canada is competent to enact the Bill referred in its entirety. By Crocket J. : The Bill referred is wholly ultra vires of the Parliament of Canada. By Davis J. : The Bill referred if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceedings commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province."

From this judgment of the court the Attorneys-General for Ontario, British Columbia and New Brunswick have by special leave brought this appeal, which the Attorney-General for Quebec has intervened to support. The Attorneys-General for Canada and for Manitoba and Saskatchewan are respondents to the appeal. The hearing of the appeal was postponed until the conclusion of the war. Their Lordships think it worth

while to observe that H.M. Attorney-General in England took no part in the controversy, which has throughout been between the Dominion of Canada and certain of the provinces on the one hand and others of the provinces on the other hand. The single issue has been whether, as the appellants contend, the subject-matter of Bill 9 falls within the exclusive powers committed to the provincial legislatures of the Provinces of Canada under s. 92 of the British North America Act, 1867, or, as the respondents contend, is within the powers of the Parliament of Canada under s. 101 or, alternatively, under s. 91 of that Act. An alternative argument was faintly addressed to their Lordships by counsel for the appellants, that the Bill lay within the powers of neither provinces nor Dominion, but H.M. Attorney-General in England did not intervene to support this view and their Lordships see no valid reason for accepting it.

The sections of the British North America Act to which it is necessary to refer are ss. 91, 92, 101 and 129. Sections 91 and 92 fall within Part VI of the Act, which is entitled "Distribution of Legislative Powers," and by s. 91 it is enacted that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated: that is to say,—". Then follow twenty-nine enumerated classes covering a very wide field, of which, for reasons which will later appear, mention must be made of number 27, "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." Section 91 ends with the words "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Section 92 is as follows, "In each province the legislature may exclusively make laws in relation to matters coming

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“ within the classes of subjects next hereinafter enumerated ;
 “ that is to say,—”. Then follow sixteen enumerated classes,
 in which the provincial aspect of the subject-matter is reiterated.
 It is on the fourteenth class that the appellants rely “ The
 “ administration of justice in the province, including the
 “ constitution, maintenance, and organization of provincial
 “ courts, both of civil and criminal jurisdiction, and including
 “ procedure in civil matters in those courts.” They also call in
 aid the thirteenth class “ Property and Civil Rights in the
 “ province.” The sixteenth and last class is “ Generally all
 “ matters of a merely local or private nature in the province.”

Section 101 (which falls within Part VII. of the Act, entitled
 “ Judicature”) is in these terms : “ The Parliament of Canada
 “ may, notwithstanding anything in this Act, from time to
 “ time, provide for the constitution, maintenance, and organi-
 “ zation of a general court of appeal for Canada, and for the
 “ establishment of any additional courts for the better adminis-
 “ tration of the laws of Canada.” Before stating how this
 power has been exercised it will be convenient to refer to s. 129
 of the Act and briefly to restate the familiar facts in regard to
 appeals to His Majesty in Council.

Section 129 of the Act provides that, except as thereby
 otherwise provided, all laws in force in Canada, Nova Scotia
 or New Brunswick at the Union, and all courts of civil and
 criminal jurisdiction, and all legal commissions, powers, and
 authorities, and all officers, judicial, administrative, and
 ministerial, existing therein at the Union, should continue in
 Ontario, Quebec, Nova Scotia and New Brunswick respectively
 as if the Union had not been made ; subject nevertheless (except
 with respect to such as should be enacted by or exist under Acts
 of the Parliament of Great Britain or of the Parliament of the
 United Kingdom of Great Britain and Ireland), to be repealed,
 abolished, or altered by the Parliament of Canada, or by the
 legislature of the respective provinces, according to the
 authority of the Parliament of that legislature under that Act.
 The Act further made provision for the admission of other
 colonies or provinces into the Union. The manner in which
 this power was exercised and the growth of Canada to a great
 Dominion are matters of history which need not be narrated
 here. Suffice it to say that to the provinces originally brought
 within the Union and to those afterwards admitted to it the
 relevant provisions of the British North America Act which
 have been cited equally apply. And for them all the question

is the same, whether it is for them or for the Dominion to legislate in regard to appeals to His Majesty in Council whether from their own provincial courts or from the Supreme Court of Canada set up under s. 101 of the Act.

Their Lordships have, in the consideration of this case, been greatly assisted by the elaborate statements appearing in the factums and formal cases of the parties, and in the opinions of the learned judges of the Supreme Court in regard to the manner in which the appeal from the several provinces to His Majesty in Council has from time to time been regulated. It does not, however, appear to their Lordships to be necessary to consider these matters in detail nor to distinguish those cases in which appeal is said to lie as of right from those in which it is said to lie by leave under the prerogative. This has been for practical purposes a convenient mode of division, but fundamentally in both classes of case the appeal is founded on that prerogative which, as long ago as 1867 in *Reg. v. Bertrand* (1), was described as "the inherent prerogative right, "and, on all proper occasions, the duty, of the Queen in "Council to exercise an appellate jurisdiction, with a view not "only to ensure, as far as may be, the due administration of "justice in the individual case, but also to preserve the due course "of procedure generally." The exercise of this appellate jurisdiction is regulated generally by the Judicial Committee Acts, and, in regard to each of the provinces of Canada, either (as, for example, in the case of Manitoba) by Orders in Council or (as in the case of Ontario and Quebec) by provincial statutes made under the authority or assumed authority (it matters not which) of the Constitutional Act of 1791 or (as in the case of British Columbia) by an imperial statute, and the only difference between the two classes of case is that an appeal may be said to lie as of right when an appellant brings his appeal under the provisions of the relevant Order in Council or statute; when he cannot do so, but can only appeal by special leave of the Sovereign on the advice of the Judicial Committee itself, then the appeal is sometimes said to be under the prerogative, a description which, if it is intended to be exclusive, is inaccurate.

It is convenient shortly to restate what immediately after the Act and, indeed, at all times until the passing of the Statute of Westminster (to which reference will shortly be made) was the constitutional bar to legislation whether by Dominion or

(1) L. R. 1 P. C. 520, 530.

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province in regard to appeals to His Majesty in Council. In the first place, it must be remembered that by the Colonial Laws Validity Act, 1865, any colonial law which was repugnant to the provisions of an Act of the United Kingdom extending to the colony either by express words or necessary intendment was void and inoperative to the extent of such repugnancy. It followed that neither Dominion nor province could then validly legislate so as to abolish a right of appeal to the King in Council which was provided by imperial Acts. In the second place, the doctrine which imposed a territorial limitation on the powers of colonial legislatures, might be regarded as a fetter on the legislative competence of Dominion or province to deal with the so-called "prerogative" right of appeal. In the third place, the express terms of the exception in s. 129 of the Act, to which reference has been made, precluded any alteration of imperial Acts.

It is now necessary to return to s. 101 of the Act. Acting under its authority the Parliament of Canada in the year 1875 passed the Supreme Court of Canada Act, which has from time to time been amended and, as amended, is now R. S. C. 1927, ch. 35. Under that Act a Supreme Court of Appeal was established which, under s. 35, was to have, hold and exercise, an appellate civil and criminal jurisdiction within and throughout Canada. It prescribed the limits within, and the terms on which, an appeal might be brought from the courts of the provinces, and by s. 54 provided that the judgment of the court should in all cases be final and conclusive and that no appeal should be brought from any judgment or order of the court to any court of appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to His Majesty in Council might be ordered to be heard, saving any right which His Majesty might be graciously pleased to exercise by virtue of His royal prerogative. It is this s. 54 which the Bill now challenged seeks to amend, and two things may be noticed about the section as originally enacted. In the first place, it is silent, as is the whole Act, about appeals from the provincial courts to His Majesty in Council. In the second place, so far as appeals from the Supreme Court are concerned, it expressly saves the prerogative while denying any appeal as of right.

Such being the position before the year 1931, in that year was passed the Statute of Westminster, 1931, an Act of the Imperial Parliament, which has as its sub-title "An Act to give effect

“ to certain resolutions passed by Imperial Conferences held “ in the years 1926 and 1930.” The recitals in the preamble of this Act, after referring to the reports of the Conferences, affirm that it is proper to set out that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles should thenceforth require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom, and that it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. By s. 2, sub-s. 1, it is provided that the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of the Act by the Parliament of a Dominion (which, by definition, includes the Dominion of Canada), and by s. 2, sub-s. 2, that no law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion. By s. 3, it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. (It may be noticed that this power is not given to the legislature of a province.) By s. 4, it is provided that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. It remains only to refer to s. 7, which deals with Canada only. By that section it is provided (by sub-s. 1) that nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or

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regulation made thereunder ; (by sub-s. 2) that the provisions of s. 2 of the Act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces, and (by sub-s. 3) that the powers conferred by the Act upon the Parliament of Canada or upon the legislatures of the provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the provinces respectively.

It is in the light of this Act of transcendent constitutional importance that the question must now be considered whether it is competent for the Parliament of Canada to enact not only that the Supreme Court of the Dominion shall have appellate civil and criminal jurisdiction within and for Canada, but also that that jurisdiction shall be "exclusive" and "ultimate." This question must be considered under two heads, first, in regard to appeals from the Supreme Court itself, and, secondly, in regard to appeals direct from the provincial courts to His Majesty in Council. First, then, as to appeals from the Supreme Court itself. Here the question is whether under sub-s. 1, of the substituted s. 54, the jurisdiction can validly be made "ultimate," by which, as the subsequent new subsections make clear, is intended the abolition of appeal from the Supreme Court to His Majesty in Council. On this question their Lordships can entertain no doubt. The power vested in the Dominion Parliament by s. 101 of the British North America Act to establish a general court of appeal for Canada was necessarily subject to the prerogative right of His Majesty, since that right was not expressly or by necessary intendment excluded, and this limitation was recognized in the first words of s. 54 of the Supreme Court Act. But that was a restriction or fetter on the legislative power of the Dominion which could be removed, and has been removed, by an Act of the Imperial Parliament, and, since it has been removed, it must be within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing Dominion.

Secondly, as to appeals direct from provincial courts to His Majesty in Council. It is in regard to these appeals that the validity of the Bill has been more strenuously challenged, and their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instru-

ment, the authors of which did not contemplate the possibility of either meaning. For how could it be supposed in 1867, only two years after the passing of the Colonial Laws Validity Act, that the competence of either the Dominion or the provincial legislatures to pass laws directly repugnant to Acts of Parliament of the United Kingdom and to the common law relating to the prerogative could be the subject of judicial determination? Yet this is the question which must now be decided. In its solution their Lordships have the advantage of two recent pronouncements of the Board, *Nadan v. The King* (1) and *British Coal Corporation v. The King* (2), the first before, the second after, the passing of the Statute of Westminster, and it will be convenient to see what these cases decided.

In *Nadan's* case (1), the question was as to the validity of s. 1025 of the Criminal Code of Canada if and so far as it purported to prevent the King in Council from giving effective leave to appeal against an order of a Canadian court in a criminal case. Criminal law, including the procedure in criminal matters, was, it will be remembered, one of the subjects to which, under s. 91 of the Act, the exclusive authority of the Parliament of Canada extended. It was argued that the legislative power so conferred was complete, and included power to limit the royal prerogative to entertain an appeal. The Board, after a review of the prerogative and of the manner in which the Judicial Committee had been in effect established as a court of appellate jurisdiction, rejected the argument, holding that however widely the powers conferred by s. 91 were construed they were confined to action to be taken in the Dominion and did not authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal, and further holding that s. 1025 of the Criminal Code, if and so far as it was intended to have that effect, was repugnant to the Judicial Committee Acts and therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865.

In 1935 there came before the Board the *British Coal Corporation* case (2) in which the same question was raised, but with this vital difference, that in the meantime the Statute of Westminster had been passed. The section of the Criminal Code then in force purported in unambiguous terms to abolish the appeal to His Majesty in Council; "Notwithstanding any " royal prerogative or anything contained in the Interpretation

(1) [1926] A. C. 482.

(2) [1935] A. C. 500.

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" Act or in the Supreme Court Act, no appeal shall be brought
" in any criminal case from any judgment or order of any
" court in Canada to any court of appeal or authority in which
" in the United Kingdom appeals or petitions to His Majesty
" may be heard." The validity of this provision was challenged
by certain persons who sought leave to appeal in a criminal
case from a judgment of the court of King's Bench (Appeal
Side) of the Province of Quebec. But it was challenged in
vain. The Board, after once more expounding the nature of
appeals to His Majesty in Council, explained the decision in
Nadan's case (1) thus: " Their Lordships are of opinion that
" the judgment was based on two grounds only: (1.) that
" s. 1025 was repugnant to the Privy Council Acts of 1833 and
" 1844 and was therefore void under the Colonial Laws Validity
" Act, 1865; (2.) that it could only be effective if construed
" as having an extra-territorial operation, whereas according to
" the law as it was in 1926 a Dominion statute could not have
" extra-territorial operation. These two difficulties as the law
" then stood could only be overcome by an Imperial Statute
" Such, their Lordships think, is the meaning of the
" decision in *Nadan's* case (1) . . . " (2). The Board proceeded
to consider the question whether the difficulties had been
overcome. Recalling the words used by Lord Loreburn L.C.,
in delivering the judgment of the Judicial Committee in
Attorney-General for Ontario v. Attorney-General for Canada (3):
" Now, there can be no doubt that under this organic
" instrument the powers distributed between the Dominion
" on the one hand and the provinces on the other hand, cover
" the whole area of self-government within the whole area of
" Canada. It would be subversive of the entire scheme and
" policy of the Act to assume that any point of internal self-
" government was withheld from Canada " (words that their
Lordships reiterate in regard to the present appeal), the Board
concluded that both difficulties had been removed by the
Statute of Westminster. " There now remain," it was said
" only such limitations as flow from the Act itself, the operation
" of which as effecting the competence of Dominion legislation
" was saved by s. 7 of the statute, a section which excludes
" from the competence of the Dominion and provincial
" Parliaments any power of ' repeal, amendment or alteration '
" of the Act " (4). It has been properly urged on behalf of

(1) [1926] A. C. 482.

(3) [1912] A. C. 571, 581.

(2) *Ibid.* 516.

(4) [1935] A. C. 520.

the appellants that at the conclusion of their judgment the Board observed that they were dealing only with the legal position in Canada in regard to that type of appeal in criminal matters, and that it was there neither necessary nor desirable to touch on the position as regards civil cases. It was this consideration that led Davis J. in the present case to give the qualified opinion already cited in regard to the validity of the referred Bill. This opinion rightly recognizes that whether or not the reasoning of the Board in the *British Coal Corporation* case (1) extends beyond the subject-matter of legislation which was by s. 91 of the Act confided to the Dominion Parliament, at any rate it cannot be limited to one only of the twenty-nine classes of subject-matter enumerated in that section, and that just as an appeal to His Majesty in Council may by Dominion legislation be abrogated in respect of "the criminal law . . . including the procedure in criminal matters," so it may be abrogated in respect of, e.g., class 21 "bankruptcy and insolvency" or class 22 "patents of invention and discovery."

But the conclusion reached by Davis J. involves a distinction which their Lordships would not willingly adopt. For if, as he holds, the subject-matter provides the test whether the right of appeal may be abrogated by Dominion legislation so that it may not be abrogated in respect of classes of subjects assigned exclusively to the provinces under s. 92, a strange result would follow. It must be remembered that in the provincial courts the subject-matter of litigation may arise as well under Dominion as under provincial legislation. The judicial and legislative spheres are not coterminous, provincial courts determining all questions except those for which a special court is set up under s. 101, whether the rights of the parties spring from the common law or Dominion or provincial statutes. Thus, if the right of the Dominion Parliament to prohibit appeals to His Majesty in Council from a provincial court depended on the subject-matter in suit, the result would be that from the same court an appeal might lie in one suit to the Supreme Court of Canada only but in another to that court or to His Majesty in Council, nor is it impossible that in the same suit two or more questions might be raised in respect of which different rights of appeal would arise. This result is yet more remarkable when it is remembered how wide is the scope of those classes of subjects which, falling within s. 91 of the Act, can on this hypothesis be excluded from appeal to His Majesty

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in Council. Only the residue of civil cases, in which the rights of the parties were determinable by reference to other than Dominion legislation, would remain the subject of such appeal.

Therefore, while their Lordships give full weight to the observation with which the judgment in the *British Coal Corporation* case (1) concluded and do not doubt that that case rightly decided that the Dominion Parliament was competent to exclude appeals in criminal cases for the reasons therein appearing, they must observe that that decision can be supported on wider grounds which cover not only criminal cases and not only civil cases falling within the subject-matter of s. 91, but also every other case which can be brought before any provincial court in Canada. In coming to this conclusion their Lordships do not think it useful to embark on a nice discrimination between the legislative powers contained in ss. 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of s. 92, "The administration of justice in the province" would, if they were disembarrassed of any context, be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground of their decision; for it is elsewhere, it is in s. 101 of the Act that the solution lies.

In his judgment in the case under appeal the former Chief Justice of Canada, Sir Lyman Duff, used these words: "Assuming even that s. 92 gives some authority to the legislatures [of the provinces] in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under s. 101. Whatever is granted by the words of the section, read and applied as prima facie intended to endow Parliament with power to effect high political objects concerning the self-government of the Dominion (s. 3 of the B.N.A. Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada." (2) The vital words in the passage cited, with which their Lordships are in full agreement, are the words in the last line "and final." But in the opinion of their Lordships the same considerations

(1) [1935] C. A. 500.

(2) [1940] S. C. R. (Can.) 63.

lead to the conclusion that the court so established must have not only "final" or "ultimate" but also exclusive appellate jurisdiction. They would emphasize that s. 101 confers a legislative power on the Dominion Parliament which by its terms overrides any power conferred by s. 92 on the provinces or preserved by s. 129. "Notwithstanding" "anything in this Act" are words in s. 101 which cannot be ignored. They vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament. This was fully recognized in *Crown Grain Co., Ltd. v. Day* (1).

What, then, is the power of the Dominion Parliament since the Statute of Westminster has come into operation? It is useful to examine what the position would be if now, for the first time, the Dominion legislature thought fit to exercise its power under s. 101. Nor is this a fanciful or inept mode of examination, for the power is to provide "from time to time" for a general court of appeal. To their Lordships it appears reasonably plain that, since, in the words used by Lord Robertson in delivering the opinion of the Board in the *Crown Grain Co.* case (2): "the subject in conflict belongs primarily to the "subject-matter committed to the Dominion Parliament, "namely, the establishment of the Court of Appeal for Canada," to that Parliament also must belong the power not only to determine in what cases and under what conditions the appellate jurisdiction of that court may be invoked, but also to deny appellate jurisdiction to any other court. The natural attribute of sovereign power was no doubt qualified by an external constitutional limitation, namely, the existence of imperial statutes, but, given the power to abrogate such statutes, the authority conferred by s. 101 stands unqualified and absolute.

It is possible to regard this matter from a somewhat wider point of view, as, indeed, it is regarded in the judgment of Sir Lyman Duff. Giving full weight to the circumstances of the Union and to the determination shown by the provinces as late as the Imperial Conferences, which led to the Statute of Westminster, that their rights should be unimpaired, nevertheless, it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a

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(1) [1908] A. C. 504.

(2) Ibid. 507.

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Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *British Coal Corporation* case (1) a "prime element in Canadian "sovereignty," which would be impaired if at the will of its citizens recourse could be had to a tribunal, in the constitution of which it had no voice. It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion legislature under s. 101 of the Act.

In this connexion some argument was addressed to their Lordships on the importance of uniformity of legal decision, which, it was urged, could not be secured if appeal lay indifferently to the Supreme Court of Canada or to His Majesty in Council. For a decision of the Supreme Court would at least be final, though its jurisdiction would not on this hypothesis be exclusive. Against this it was contended that the British North America Act contained in s. 94 a provision whereby the postulated uniformity of law could be obtained. In their Lordships' opinion this section provides an imperfect remedy for a state of affairs in which an important Dominion Act might be finally interpreted in one way by the Supreme Court for a province which did not admit appeals to His Majesty in Council and in another way by the Judicial Committee for a province which did admit such appeals, neither tribunal admitting the authority of the other. But it is the possibility of such a conflict, creating a different law for different provinces out of the same Dominion Act, which points the way to a truer interpretation of the British North America Act in the light of the Statute of Westminster. It is, in fact, a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens. This result is attainable only if s. 101 now authorizes the establishment of a court with final and exclusive appellate jurisdiction. The words used by Lord Macmillan in delivering the opinion of the Board in *Croft v. Dunphy* (2), on a question that arose in regard to one of the

(1) [1935] A. C. 500.

(2) [1933] A. C. 156.

specific subjects enumerated in s. 91 are equally applicable in the consideration of s. 101; "their Lordships," he said, "see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state" (1).

It is right to conclude with some observations on s. 7 of the Statute of Westminster on which counsel for the appellants strongly relied. Sub-section 1 of s. 7 is in general terms, and it was urged that to interpret the statute as vesting in the Dominion Parliament a power which it did not before possess was in effect to repeal or amend or, at least, to alter the British North America Act. But their Lordships cannot accept this reasoning. Necessarily the effect of the statute is to amend and alter the Act in so far as from the operation of the statute there arises a new power in the legislatures of both the Dominion and the provinces. The question is, in which legislature the power is vested in regard to this particular subject-matter. That is a question of construction on which their Lordships have stated their opinion. Sub-section 2 does not call for further comment here. In regard to sub-s. 3 the same observations appear to apply as to sub-s. 1. If on the true construction of the British North America Act the conclusion had been that the power to legislate for the abrogation of appeals to His Majesty in Council was vested under s. 92 in a provincial legislature, that would have been an end of the matter. It is just because their Lordships have come to a different conclusion that sub-s. 3 does not assist the appellants.

Their Lordships are of opinion that this appeal fails, and that it ought to be declared that Bill 9 of the Fourth Session of the Eighteenth Parliament of Canada, entitled "An Act to amend the Supreme Court Act," is wholly intra vires of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for the Attorneys-General for Ontario and New Brunswick: *Blake & Redden*.

Solicitors for the Attorney-General for British Columbia: *Gard, Lyell & Co.*

Solicitors for the Attorneys-General for Canada, Manitoba and Saskatchewan: *Charles Russell & Co.*

Solicitors for the Attorney-General for Quebec: *Lawrence Jones & Co.*

(1) [1933] A. C. 163.

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READ APPELLANT ;

May 13, 14,
15, 16, 20,

AND

21, 23 ;
Oct. 18.

J. LYONS & COMPANY, LIMITED . . . RESPONDENTS.

Factory — Occupier — Manufacture of explosives — Explosion — Cause unknown—No negligence by occupier alleged—Personal injury to person lawfully on premises—Liability.

The appellant, who was employed as an inspector of munitions by the Ministry of Supply, was injured in the course of her duties, while in a munitions factory operated by the respondents, by the explosion of a high explosive shell during the process of manufacture. The explosion was not alleged to be due to any negligence on the part of the respondents who were operating the factory under a contract with the Minister of Supply, by the terms of which they were declared to be the agents of the Minister. The appellant, who was registered under the National Service Acts, had been directed to her work as an inspector by the Labour Exchange :—

Held that the respondents were not liable to the appellant in damages, since there had been no escape of any dangerous thing from their premises and accordingly an essential condition for the application of the rule in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330 was wanting.

Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd. [1921] 2 A. C. 465, commented on.

Decision of the Court of Appeal [1945] K. B. 216, affirmed.

APPEAL from the Court of Appeal (Scott, MacKinnon and du Parc L.JJ.).

The facts, summarized from their Lordships' opinions, were as follows : In fulfilment of an agreement, dated January 28, 1942, made between the Minister of Supply and the respondents, J. Lyons & Co., Ltd., the latter undertook the operation, management and control of the Elstow Ordnance Factory in Bedfordshire, the property of the Minister, as agents for the Minister. They went into occupation of it and there carried on the business of manufacturing high-explosive shells for the government, in which process they filled shell cases with high-explosive. In April, 1942, the appellant, Norah Read, who was registered under the National Service Acts, was told at

* *Present* : VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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the Labour Exchange that she must work at the factory as an inspector employed by the Armaments Inspection Department of the Ministry, with the duty of inspecting the filling of shell cases. No statutory direction to that effect was served on her but one would have been served had she refused to go. She applied for other employment, and, had she been a free agent, she would not have remained at the factory, to which she went against her personal wishes. Her work required her to be present in a shell-filling shop. On August 31, 1942, whilst she was lawfully in the shell-filling shop in discharge of her duty, an explosion occurred which killed a man and injured her and other persons. She sued the respondents for damages for personal injuries. By para. 1 of her statement of claim she averred that the respondents "were at all material times the "occupiers of certain premises known as the Elstow Ordnance "Factory." By para. 2 she averred that "at the said "premises the [respondents] carried on the manufacture of "high-explosive shells. To the knowledge of the [respondents] "high-explosive shells were dangerous things." By para. 4 she averred that in the course of her employment she "was "lawfully in a shell-filling shop at the said premises when a "high-explosive shell exploded whereby the [appellant] suffered "injuries, loss and damage." No negligence was averred or proved against the respondents. The respondents pleaded that the appellant "voluntarily incurred the risk of explosion as a "risk incidental to her employment" and that the statement of claim disclosed no cause of action. Cassels J. held that the respondents were liable, the damages being assessed at 575*l.* 2*s.* 8*d.* The Court of Appeal reversed this decision. The appellant appealed to the House of Lords, setting out in her printed case the following questions: "(a) Whether the "manufacturer of high-explosive shells is under strict liability "to prevent such shells from exploding and causing harm to "persons on the premises where such manufacture is carried "on, as well as to persons outside such premises; (b) whether, "if the appellant would otherwise be entitled to recover, "she is debarred from recovering by the operation of the "principle embodied in the maxim *volenti non fit injuria*."

Paull K.C. and *Goldie* for the appellant. It is not known how the explosion took place but it is not admitted that there was no negligence, since in cases of strict liability negligence is inferred and need not be pleaded. The respondents in this

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case are under such a liability. If it can be shown (a) that they chose to bring on to, collect on, or make on, the land which they occupied something which was inherently capable of doing mischief to persons or property, unless it was kept under control, and (b) that what they did amounted to a non-natural user of the land; then a strict liability arose not to let an escape from control take place and the respondents are liable for any damage resulting from such an escape. An alternative way of putting it, suggested by the words of Blackburn J., in *Fletcher v. Rylands* (1), is that there was, in the circumstances, a duty on the respondents to take successful care that no damage should ensue to the appellant. The respondents' liability, resting on the principle in *Rylands v. Fletcher* (2) is a liability to all the world in respect of any mischief: see Charlesworth on Negligence, p. 219, and *Chapin Cross Electricity Supply Co. v. Hydraulic Power Co.* (3). *Manchester Corporation v. Markland* (4) is not an example of that principle. Essentially the principle is concerned with escape from control of that which is inherently capable of doing mischief. It is not confined to the case of land or the occupation of land by the person alleged to be liable. In determining what are things inherently capable of doing mischief the factor of capacity for movement is of primary importance. Water, for example, comes within the category because it is capable of movement. Glass, on the other hand is outside the category because, though it may do damage, it has no capacity for independent movement. Explosives and fumes come within the same category as water since they are capable of doing damage although nothing has been done to them. A ship filled with ammunition may explode and do great damage in circumstances in which no damage would have been done if it had been filled with circular saws. Of course, a jug of water or one small firework would not be within the rule in *Rylands v. Fletcher* (2), but a whole reservoir of water and a pile of explosives would be. The rule must be kept narrow and applied only to things dangerous per se, not to things which are merely potentially dangerous: see *Glasgow Corporation v. Muir* (5). Explosives are inherently capable of doing mischief, and a manufacturer of explosives is liable to all the world for the consequences if they explode, just as a person who took explosives through

(1) (1866) L. R. 1 Ex. 265, 268.

(4) [1936] A. C. 360.

(2) (1868) L. R. 3 H. L. 330.

(5) [1943] A. C. 448, 463, 464.

(3) [1914] 3 K. B. 772.

the public streets would be liable if they did damage, without proof of negligence on his part, unless he showed that their explosion was due to act of God. ~~There is thus a category of things and operations dangerous in themselves, and those who harbour such things or carry on such operations on their premises do so at their peril and are liable, apart from negligence, for any personal injuries thereby occasioned.~~ The manufacture of high-explosive shells is such an operation. The dangerous character of the business involves a risk of explosion and the respondents owed the appellant a duty to safeguard her from any harm resulting from that danger. That operation is so intrinsically dangerous that no degree of care, however scrupulous, can prevent accidents and those who, for their own ends, choose to carry it on do so at their peril. This is in accordance with medieval legal theory that a man was liable for all the harm he had inflicted on another by his acts, if what he did could be brought within some form of action, whether that harm was inflicted intentionally or negligently or accidentally: see Holdsworth's History of English Law, vol. 8, pp. 446, 464-5, 468-9. To bring the case within the strict liability envisaged by *Rylands v. Fletcher* (1), there must be escape from control. It is not necessary that there should be an escape from the defendant's land. This is in harmony with the medieval theory: see *Lambert v. Bessey* (2) which was cited in *Rylands v. Fletcher* (1). The headnote of the report of the decision of the House of Lords in *Rylands v. Fletcher* (1) is more accurate than that of the report of the decision of the inferior court in *Fletcher v. Rylands* (3) which might give a wrong impression that an escape from the land was essential. In that particular case the water was harmless while it was on the defendant's premises and so there would only be a cause of action in the event of an escape, but Blackburn J. did not mean that an action would never lie unless there was an escape. He cited *May v. Burdett* (4) where there was no escape. In the case of liability for animals there is no need for an escape from the defendant's land. It is not the essence of cattle trespass, e.g., a man's own cattle on his own land may eat corn set aside for the purpose of tithes: see Oliver Wendell Holmes's lectures on The Common Law, pp. 6, 116-7; Glanville Williams on Liability for Animals, pp. 152, 154, 156, 197, 199; and

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(1) L. R. 3 H. L. 330.

(3) L. R. 1 Ex. 265.

(2) (1679) T. Raym. 421.

(4) (1846) 9 Q. B. 101.

H. L. (E.) *Williams v. Ladner* (1). As regards the keeping of wild animals there is no real distinction between this and the collecting on one's land of things inherently capable of doing mischief. [They also referred to *Mason v. Keeling* (2) and Blackstone's Commentaries (1st ed.), vol. 2, pp. 389, et seq.] Further, this case comes within *Rylands v. Fletcher* (3) because the manufacture of explosives is a "non-natural" use of land: see *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (4). Finally, though law is not logic, the nearer one can get to logic the better and there is an inherent illogicality in the respondents' contention, which should be rejected because the appellant's contention makes for consistency. There is no reason why a person just off the premises of the respondents should have a remedy by virtue of the principle in *Rylands v. Fletcher* (3) and a person just on their premises should not. According to the respondents' argument, if water from a broken reservoir flooded a village on the waterworks company's own land and another off it, persons in the first village would have no remedy while those in the second village would have one. It is an essential part of the appellant's case that she was directed into this factory. Had she gone to work there voluntarily she would have been defeated by the principle *volenti non fit injuria*. [They referred to *Jones v. Festiniog Ry. Co.* (5); *Powell v. Fall* (6); *Filburn v. People's Palace & Aquarium Co., Ltd.* (7); *Green v. Chelsea Waterworks Co.* (8); *Ponting v. Noakes* (9); *West v. Bristol Tramways Co.* (10); *Midwood & Co., Ltd. v. Manchester Corporation* (11); *Miles v. Forest Rock Granite Co., Ltd.* (12); *Knott v. London County Council* (13); *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.* (14); *Honeywill & Stein, Ltd. v. Larkin Brothers (London's Commercial Photographers), Ltd.* (15); *Howard v. Furness Houlder Argentine Lines, Ltd.* (16); *Jones v. Llanrwst Urban District Council* (17); *Oliver v. Saddler & Co.* (18); the Explosives Act, 1875, s. 102; the Railway Fires Act, 1905; Salmond on the Law of Torts (10th ed.)

(1) (1798) 8 Term Rep. 72.

(2) (1699) 12 Mod. 332.

(3) L. R. 3 H. L. 330.

(4) [1921] 2 A. C. 465.

(5) (1868) L. R. 3 Q. B. 733.

(6) (1880) 5 Q. B. D. 597.

(7) (1890) 25 Q. B. D. 258, 261.

(8) (1894) 70 L. T. 547.

(9) [1894] 2 Q. B. 281.

(10) [1908] 2 K. B. 14.

(11) [1905] 2 K. B. 597.

(12) (1918) 34 T. L. R. 500.

(13) [1934] 1 K. B. 126, 138.

(14) [1936] A. C. 108.

(15) [1934] 1 K. B. 191.

(16) (1936) 41 Com. Cas. 290.

(17) [1911] 1 Ch. 393.

(18) [1929] A. C. 584.

pp. 117, 516, 539 ; Winfield's Textbook of the Law of Torts, (3rd ed.), pp. 491-2, 508 ; Goodhart on Liability for Things Naturally on the Land, 4 Cambridge Law Journal, pp. 13, 22, 23 ; Hale's Pleas of the Crown, vol. 1, p. 430.]

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Sir Hartley Shawcross A.-G. and H. L. Parker for the respondents. It is not now contended that the appellant is debarred from succeeding by the operation of the principle *volenti non fit injuria*. It is conclusive against her that the rule in *Rylands v. Fletcher* (1) cannot apply here, because there was no escape from the respondents' premises. However, on a wider view, the appeal must be dismissed because the respondents were performing a public duty and they were not, in the circumstances, putting their land to a "non-natural" user. The propositions on which the appellant relies are inappropriate to an industrial age ; they would involve a return to medieval legal theory, putting employers back in the position of insurers. It is not desirable to restrict industrial activities beneficial to the public by laying down that those who engage in them do so at their peril. The law should be maintained in harmony with the existing circumstances of the time. Regard must be had to the march of time and to modern developments, on which depend the conditions of modern civilization. This case is not within the rule in *Rylands v. Fletcher* (1), which is really founded on the idea that the defendant did what he should not have done. It depends on negligence, though the greater the danger, the greater the care required of him. In the authorities the application of the standard of things called dangerous in themselves has no logic about it. The same thing has been held dangerous in itself in some circumstances but not in others : see *Salmond's Law of Torts*, 10th ed., p. 518. The true question is not whether a thing is dangerous in itself but whether, by reason of some extraneous circumstances it may become dangerous. There is really no category of dangerous things ; there are only some things which require more and some which require less care : see *Haseldine v. Dawes & Son, Ltd.* (2) ; *Pass of Ballater* (3) ; and *Honeywill & Stein, Ltd. v. Larkin Brothers (London's Commercial Photographers), Ltd.* (4). Circumstances alter and the manufacture of explosives, which was formerly particularly dangerous, is now one of the safest industrial processes, with fewer risks than coal mining. In cases

(1) L. R. 3 H. L. 330.

(3) [1942] P. 112.

(2) [1941] 2 K. B. 343.

(4) [1934] 1 K. B. 191.

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of gas explosions in coal mines, the matter was never put on the ground of liability without fault on the footing of things inherently dangerous. In the light of these considerations the trend has been to restrict the application of the rule in *Rylands v. Fletcher* (1). The appellant is seeking to reverse this trend and to extend the rule. The modern tendency has been to limit the sphere of liability without fault. It continues in the case of trespass to land but not in the case of trespass to the person. The case of liability in respect of wild animals stands by itself, as also that of domestic animals known to be dangerous. In this connexion the operation of the scienter rule is to be noted; the defendant in the case of wild animals is not allowed to allege that a particular creature is not dangerous; he is not allowed to be "wiser than the experience of "mankind": *Filburn v. People's Palace and Aquarium Co., Ltd.* (2). See also *May v. Burdett* (3); *Vaughan v. Taff Vale Ry. Co.* (4); and *Baker v. Snell* (5). With the exception of liability of this nature, all cases of absolute liability have involved, from the point of view of the defendant, an escape from the land he was using and, from the point of view of the plaintiff, an infringement of some right over property or to its enjoyment, the basis of the principle being the idea that each is master on his own land. Cattle trespass, like the case of trespass by fire, water or filth, involves an escape from the defendant's land: see *Ellis v. Loftus Iron Co.* (6) and *Manton v. Brocklebank* (7). If liability within the rule in *Rylands v. Fletcher* (1) were universally applicable to things held to be dangerous in themselves, irrespective of whether or not there had been an escape, then the discussion in many of the cases as to the proper degree of care would have been unnecessary. *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (8) is distinguishable because there was in that case an escape from the premises of the defendants but none in the present case: see also *Charing Cross Electricity Co. v. Hydraulic Power Co.* (9); *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.* (10); *Weaver v. Ward* (11); and *Tuberville v. Stamp* (12). Another condition besides escape is necessary to

(1) L. R. 3 H. L. 330.

(2) 25 Q. B. D. 258, 261.

(3) (1846) 9 Q. B. 101.

(4) (1860) 5 H. & N. 679, 687.

(5) [1908] 2 K. B. 825.

(6) (1874) L. R. 10 Ex. 255, 258.

(7) [1923] 2 K. B. 212.

(8) [1921] 2 A. C. 465.

(9) [1914] 3 K. B. 772.

(10) [1936] A. C. 108.

(11) (1616) Hob. 134.

(12) (1697) 12 Mod. 152.

found liability under the rule in *Rylands v. Fletcher* (1) and that is that the user of the land must be "non-natural." But in an industrial country it is not "non-natural" to use land for the purposes of industry, so that while keeping wild animals may be classed as a dangerous luxury, carrying on an essential industry is not. The court must have regard to the circumstances of the time. A "non-natural" user of land, adopted by the occupier of land for his own purposes, is one in which the community has no interest or one which has no relation to the requirements of modern civilized man. Not only statutory authority but well recognized custom should take out of the scope of the rule in *Rylands v. Fletcher* (1) such activities as those of the respondents since these were not being pursued for a private whim but in accordance with a public duty. The fact that they were not compelled to do the work but were performing it on a commercial basis is irrelevant. Absence of remuneration is not the test of a public duty, since almost every one discharging such a duty is in fact remunerated, e.g., civil servants. Using land for the purposes of a public duty, such as manufacturing explosives in war time, is a natural use of it, since the proper test is whether the user is beneficial to the community, though, in the case of explosives, the courts might apply a more stringent rule in peace time: see *Rickards v. Lothian* (2); *Madras Ry. Co. v. Zemindar of Carvatenagarum* (3) and *Stallybrass on Dangerous Things and Non-Natural User of Land*, 3 Cambridge Law Journal, pp. 376, 396-7. As regards other authorities, *Firth v. Bowling Iron Co.* (4); *Attorney-General v. Corke* (5); *Hale v. Jennings Brothers* (6) and *Shiffman v. Order of St. John of Jerusalem* (7), were wrongly decided and *Miles v. Forest Rock Granite Co., Ltd.* (8) was decided on the wrong ground. *Musgrave v. Pandelis* (9) was decided on the particular facts of the case and lays down no principle of law: see also *Jefferson v. Derbyshire Farmers, Ltd.* (10). [They also referred to *St. Anne's Well Brewing Co. v. Roberts* (11); *Nichols v. Marsland* (12); *Carstairs v. Taylor* (13); *Wilson v. Newberry* (14); *Jones v. Llanrwst Urban District*

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(1) L. R. 3. H. L. 330.

(2) [1913] A. C. 263, 280.

(3) (1874) L. R. 1 I. A. 364.

(4) (1878) 3 C. P. D. 254.

(5) [1933] Ch. 89.

(6) [1938] 1 All E. R. 579.

(7) [1936] 1 All E. R. 557, 561.

(8) 34 T. L. R. 500.

(9) [1919] 2 K. B. 43.

(10) [1921] 2 K. B. 281, 290.

(11) (1928) 140 L. T. 1, 6.

(12) (1875) L. R. 10 Ex. 255, 258.

(13) (1871) L. R. 6 Ex. 217.

(14) (1871) L. R. 7 Q. B. 31, 33.

H. L. (E.) *Council* (1); *Hoare & Co. v. McAlpine* (2); *Blake v. Woolf* (3);
 1946 *Collingwood v. Home & Colonial Stores, Ltd.* (4); *Fardon v.*
 READ *Harcourt-Rivington* (5); *Stanley v. Powell* (6); *Foster v.*
 v. *Warlington Urban District Council* (7); *Williams v. Eady* (8);
 J. LYONS & Co., LD. *Wray v. Essex County Council* (9); *Hodge & Sons v. Anglo-*
American Oil Co. (10); *Dominion Natural Gas Co., Ltd. v.*
Collins (11); *Blacker v. Locke & Elliot, Ltd.* (12); *Sedleigh-*
Denfield v. O'Callaghan (13); *Bamford v. Turnley* (14); *Peters v.*
Prince of Wales Theatre (Birmingham), Ltd. (15); *R. v. Chilworth*
Gunpowder Co., Ltd. (16); *Chalmers v. William Dixon, Ltd.* (17);
Miller v. Robert Addis & Sons' Collieries, Ltd. (18); *Western*
Silver Fox Ranch, Ltd. v. Ross & Cromarty County Council (19);
Salmond on the Law of Torts (10th ed.), pp. 514, 518, 520, 538;
Winfield's Textbook on the Law of Tort (3rd ed.), p. 499;
Oliver Wendell Holmes's Lectures on The Common Law,
 pp. 96, 157; *Stallybrass on Dangerous Things and Non-*
Natural User of Land, 3 *Cambridge Law Journal*, pp. 376,
 391; *Winfield and Goodhart on Trespass and Negligence*,
 49 *Law Quarterly Review*, pp. 359, 370, and *Stallybrass's*
Notes on Read v. J. Lyons & Co., Ltd. (20) before *Cassels J.*,
 60 *Law Quarterly Review*, p. 207.]

Paull K.C. in reply. After *Rainham Chemical Works, Ltd.*
v. Belvedere Fish Guano Co., Ltd. (21) it cannot be maintained
 that there is not a class of case in which negligence or care are
 irrelevant and in which there is an absolute liability. This
 liability does not depend on whether the activity is dangerous
 or not. Even a dangerous activity may leave scope for care or
 negligence, e.g., in fencing factory machinery. The concise
 point is bringing on to the land dangerous substances inherently
 capable of doing mischief and the accident must be directly
 attributable to them. [He referred to *Belvedere Fish Guano*
Co., Ltd. v. Rainham Chemical Works, Ltd. (22); *Mansel v.*

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| (1) [1911] 1 Ch. 393, 402. | (12) (1912) 106 L. T. 533. |
| (2) [1923] 1 Ch. 167, 173. | (13) [1940] A. C. 880, 903. |
| (3) [1898] 2 Q. B. 426. | (14) (1860) 3 B. & S. 62, 83. |
| (4) (1936) 155 L. T. 550, | (15) [1943] 1 K. B. 73, 76. |
| 552, 553. | (16) (1888) 4 T. L. R. 557. |
| (5) (1932) 146 L. T. 391, 392. | (17) (1876) 3 R. 461. |
| (6) [1891] 1 Q. B. 86. | (18) 1934 S. C. 150. |
| (7) [1906] 1 K. B. 648. | (19) 1940 S. C. 601, 605. |
| (8) (1893) 10 T. L. R. 41. | (20) [1944] W. N. 130; 170 |
| (9) (1936) 155 L. T. 494, 496. | L. T. 418. |
| (10) (1922) 12 Ll. L. Rep. 183, | (21) [1921] 2 A. C. 465. |
| 188, 190. | (22) [1920] 2 K. B. 487, 499. |
| (11) [1909] A. C. 640, 646. | |

Webb (1) ; *Wing v. London General Omnibus Co.* (2) ; *Knott v. London County Council* (3) ; *Castle v. St. Augustine's Links, Ltd.* (4) ; *Lowrey v. Walker* (5) ; *Stanley v. Powell* (6) ; Pollock on Torts (14th ed.), pp. 140-1, and Beven on Negligence (4th ed.), pp. 711-2.]

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THE HOUSE took time for consideration.

OCT. 18. VISCOUNT SIMON. My Lords, no negligence was averred or proved against the respondents. The plea of *volenti non fit injuria*, for whatever it might be worth, has been expressly withdrawn before this House by the Attorney-General on behalf of the respondents, and thus the simple question for decision is whether in these circumstances the respondents are liable, without any proof or inference that they were negligent, to the appellant in damages, which have been assessed at 575*l.* 2*s.* 8*d.* for her injuries. Cassels J. who tried the case, considered that it was governed by *Rylands v. Fletcher* (7), and held that the respondents were liable, on the ground that they were carrying on an ultra-hazardous activity and so were under what is called a "strict liability" to take successful care to avoid causing harm to persons whether on or off the premises. The Court of Appeal (Scott, MacKinnon, and du Parc L.JJ.) reversed this decision, Scott L.J. in an elaborately reasoned judgment holding that a person on the premises had, in the absence of any proof of negligence, no cause of action, and that there must be an escape of the damage-causing thing from the premises and damage caused outside before the doctrine customarily associated with the case of *Rylands v. Fletcher* (7) can apply. I agree that the action fails. The appellant was a person present in the factory in pursuance of a public duty (like an ordinary factory inspector) and was consequently in the same position as an invitee. The respondents were managers of the factory as agents for the Ministry of Supply and had the same responsibility to an invitee as an ordinary occupier in control of the premises. The duties of an occupier of premises to an invitee have been analysed in many reported cases, but in none of them, I think, is there any hint of the proposition necessary to support the claim of the appellant in this case. The fact that the work that was being carried on was of a kind

(1) (1918) 88 L. J. (K. B.) 323.

(2) [1909] 2 K. B. 652, 665.

(3) [1934] 1 K. B. 126, 138-9.

(4) (1922) 38 T. L. R. 615.

(5) [1910] 1 K. B. 173, 196.

(6) [1891] 1 Q. B. 86.

(7) L. R. 1 Ex. 265 ; L. R. 3

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which requires special care is a reason why the standard of care should be high, but it is no reason for saying that the occupier is liable for resulting damage to an invitee without any proof of negligence at all.

Blackburn J., in delivering the judgment of the Court of Exchequer Chamber in *Fletcher v. Rylands* (1) laid down the proposition that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

It has not always been sufficiently observed that in the House of Lords, when the appeal from *Fletcher v. Rylands* (2) was dismissed and Blackburn J.'s pronouncement was expressly approved, Lord Cairns L.C. emphasized another condition which must be satisfied before liability attaches without proof of negligence. This is that the use to which the defendant is putting his land is "a non-natural use" (3). Blackburn J. had made a parenthetic reference to this sort of test when he said (4): "it seems but reasonable and just that the neighbour, who has brought something on his own property, *which was not naturally there*, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." I confess to finding this test of "non-natural" user (or of bringing on the land what was not "naturally there," which is not the same test) difficult to apply. Blackburn J., in the sentence immediately following that which I have last quoted, treats cattle-trespass as an example of his generalization. The pasturing of cattle must be one of the most ordinary uses of land, and strict liability for damage done by cattle enclosed on one man's land if they escape thence into the land of another, is one of the most ancient propositions of our law. It is in fact a case of pure trespass to property, and thus constitutes a wrong without any question of negligence. See per Lord Coleridge C.J. in *Ellis v. Loftus Iron Co.* (5). The circumstances in *Fletcher v. Rylands* (2) did not constitute a case of trespass because the damage was consequential, not direct. It is to be noted that all the counts

(1) L. R. 1 Ex. 265, 279.

(4) L. R. 1 Ex. 268, 280.

(2) *Ibid* 265.

(5) (1874) L. R. 10 C. P. 10, 12.

(3) L. R. 3 H. L. 330, 338, 339.

in the declaration in that case set out allegations of negligence (1) but in the House of Lords Lord Cairns begins his opinion by explaining that ultimately the case was treated as determining the rights of the parties independently of any question of negligence. The classic judgment of Blackburn J., besides deciding the issue before the court and laying down the principle of duty between neighbouring occupiers of land on which the decision was based, sought to group under a single and wider proposition other instances in which liability is independent of negligence, such for example as liability for the bite of a defendant's monkey, *May v. Burdett* (2); see also the case of a bear on a chain on the defendant's premises, *Besozzi v. Harris* (3). There are instances, no doubt, in our law in which liability for damage may be established apart from proof of negligence, but it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle. The conditions under which such a liability arises are not necessarily the same in each class of case. Lindley L.J. issued a valuable warning in *Green v. Chelsea Waterworks Co.* (4), when he said of *Rylands v. Fletcher* (5) that that decision "is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." It seems better, therefore, when a plaintiff relies on *Rylands v. Fletcher* (5), to take the conditions declared by this House to be essential for liability in that case and to ascertain whether these conditions exist in the actual case.

Now, the strict liability recognized by this House to exist in *Rylands v. Fletcher* (5) is conditioned by two elements which I may call the condition of "escape" from the land of something likely to do mischief if it escapes, and the condition of "non-natural use" of the land. This second condition has in some later cases, which did not reach this House, been otherwise expressed, e.g., as "exceptional" user, when such user is not regarded as "natural" and at the same time is likely to produce mischief if there is an "escape." Dr. Stallybrass, in a learned article on Dangerous Things and Non-Natural User of Land in 3 Cambridge Law Journal, p. 376, has collected the large variety of epithets that have been judicially employed

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(1) L. R. 1 Ex. 265,

(2) 9 Q. B. 101.

(3) (1858) 1 F. & F. 92.

(4) (1894) 70 L. T. 547, 549.

(5) L. R. 3 H. L. 330.

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in this connexion. The American Restatement of the Law of Torts, vol. 3, s. 519, speaks of "ultra-hazardous activity," but attaches qualifications which would appear in the present instance to exonerate the respondents. It is not necessary to analyse this second condition on the present occasion, for in the case now before us the first essential condition of "escape" does not seem to me to be present at all. "Escape," for the purpose of applying the proposition in *Rylands v. Fletcher* (1), means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control. Blackburn J. several times refers to the defendant's duty as being the duty of "keeping a thing in" at the defendant's peril and by "keeping in" he does not mean preventing an explosive substance from exploding but preventing a thing which may inflict mischief from escaping from the area which the defendant occupies or controls. [In two well-known cases the same principle of strict liability for escape was applied to defendants who held a franchise to lay pipes under a highway and to conduct water (or gas) under pressure through them (*Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (2); *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.* (3)). In *Howard v. Furness Houlder Argentine Lines, Ltd.* (4), Lewis J. had before him a case of injury caused by an escape of steam on board a ship where the plaintiff was working. The learned judge was, I think, right in refusing to apply the doctrine of *Rylands v. Fletcher* (1), on the ground that the injuries were caused on the premises of the defendants. Apart altogether from the judge's doubt (which I share) whether the owners of the steamship by generating steam therein are making a non-natural use of their steamship, the other condition upon which the proposition in *Rylands v. Fletcher* (1) depends was not present, any more than it is in the case with which we have now to deal. Here there is no escape of the relevant kind at all and the appellant's action fails on that ground. In these circumstances it becomes unnecessary to consider other objections that have been raised, such as the question whether the doctrine of *Rylands v. Fletcher* (1) applies where the claim is for damages for personal injury as distinguished from damages to property. It may be noted, in passing, that Blackburn J. himself when referring to

(1) L. R. 1 Ex. 265; L. R. (3) [1936] A. C. 108.

3 H. L. 330.

(4) 41 Com. Cas. 290, 296.

(2) [1914] 3 K. B. 772.

the doctrine of *Rylands v. Fletcher* (1) in the later case of *Cattle v. Stockton Waterworks Co.* (2), leaves this undealt with: he treats damages under the *Rylands v. Fletcher* (1) principle as covering damages to property, such as workmen's clothes or tools, but says nothing about liability for personal injuries.)

On the much litigated question of what amounts to "non-natural" use of land, the discussion of which is also unnecessary in the present appeal, I content myself with two further observations. The first is that when it becomes essential for the House to examine this question it will, I think, be found that Lord Moulton's analysis in delivering the judgment of the Privy Council in *Rickards v. Lothian* (3) is of the first importance. The other observation is as to the decision of this House in *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (4), to which the appellant's counsel in the present case made considerable reference in support of the proposition that manufacturing explosives was a "non-natural" use of land. This was a case of damage to adjoining property: it is reported in the Court of Appeal (5), and in the court of first instance, where it was tried by Scrutton L.J., sitting as an additional judge of the King's Bench Division (6). I find in Scrutton L.J.'s judgment (7) that he understood it to be admitted before him "that the person in possession of and responsible for the D.N.P. was liable under the doctrine of *Rylands v. Fletcher* (8) "for the consequences of its explosions." The point therefore was not really open for argument to the contrary before the House of Lords, where Lord Carson begins his opinion (9) by stating that "it was not seriously argued," and that the real point to be determined was as to the liability of two directors of the appellant company. The opinion of Lord Buckmaster, which covers many pages, is almost exclusively concerned with establishing the directors' liability, and on the other point his observation (10) merely is that the making of munitions "was certainly not the common and ordinary use "of the land." I think it not improper to put on record, with all due regard to the admission and dicta in that case, that if the question had hereafter to be decided whether the making

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(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) (1875) L. R. 10 Q. B. 453, 457.

(3) [1913] A. C. 263.

(4) [1921] 2 A. C. 465.

(5) [1920] 2 K. B. 487.

(6) (1919) 123 L. T. 211.

(7) Ibid. 212.

(8) L. R. 3 H. L. 330.

(9) [1921] 2 A. C. 465, 491, 492.

(10) Ibid. 471.

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 of munitions in a factory at the Government's request in time of war for the purpose of helping to defeat the enemy is a "non-natural" use of land, adopted by the occupier "for his own purposes," it would not seem to me that the House would be bound by this authority to say that it was. In this appeal the question is immaterial, as I hold that the appellant fails for the reason that there was no "escape" from the respondents' factory. I move that the appeal be dismissed with costs.

LORD MACMILLAN. My Lords, nothing could be simpler than the facts in this appeal; nothing more far-reaching than the discussion of fundamental legal principles to which it has given rise. The appellant, while employed as an inspector by the Ministry of Supply at the Elstow Ordnance Factory in Bedfordshire, where the respondents were engaged in the manufacture of high explosive shells for the Government, was injured by an explosion in the filling shop. She sued the respondents for damages. In her statement of claim she made no allegation of negligence on the part of the respondents. All that she averred was that the respondents were engaged in the manufacture of high-explosive shells in premises occupied by them, that the respondents knew that high-explosive shells were dangerous things and that while she was on their premises in the course of her duties a high-explosive shell exploded and caused her injury. For aught that appears the explosion may have been a pure accident for which no one was to blame. The trial judge (Cassels J.) found for the appellant. He relied mainly on the doctrine formulated in the well-known and much-discussed case of *Rylands v. Fletcher* (1), and on the decision of this House in *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (2). The Court of Appeal unanimously reversed the judgment of the trial judge and entered judgment for the respondents. The appellant with the leave of the Court of Appeal has now brought her case to your Lordships' bar.

In my opinion the appellant's statement of claim discloses no ground of action against the respondents. The action is one of damages for personal injuries. Whatever may have been the law of England in early times I am of opinion that as the law now stands an allegation of negligence is in general essential to

(1) L. R. 1 Ex. 265; L. R.
 3 H. L. 330.

(2) [1921] 2 A. C. 465.

the relevancy of an action of reparation for personal injuries. The gradual development of the law in the matter of civil liability is discussed and traced by the late Sir William Holdsworth with ample learning and lucidity in his History of English Law, vol. 8, pp. 446 et seq., and need not here be rehearsed. Suffice it to say that the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent. I do not overlook the fact that there is at least one instance in the present law in which the primitive rule survives, namely, in the case of animals *ferae naturae* or animals *mansuetae naturae* which have shown dangerous proclivities. The owner or keeper of such an animal has an absolute duty to confine or control it so that it shall not do injury to others and no proof of care on his part will absolve him from responsibility. But this is probably not so much a vestigial relic of otherwise discarded doctrine as a special rule of practical good sense. At any rate, it is too well established to be challenged. But such an exceptional case as this affords no justification for its extension by analogy.

The appellant in her printed case in this House thus poses the question to be determined: "Whether the manufacturer of high-explosive shells is under strict liability to prevent such shells from exploding and causing harm to persons on the premises where such manufacture is carried on as well as to persons outside such premises." Two points arise on this statement of the question. In the first place the expression "strict liability," though borrowed from authority, is ambiguous. If it means the absolute liability of an insurer irrespective of negligence then the answer in my opinion must be in the negative. If it means that an exacting standard of care is incumbent on manufacturers of explosive shells to prevent the occurrence of accidents causing personal injuries I should answer the question in the affirmative, but this will not avail the appellant. In the next place, the question as stated would seem to assume that liability would exist in the present case to persons injured outside the defendants' premises

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H. L. (E.) without any proof of negligence on the part of the defendants. Indeed, Cassels J. in his judgment records that (1): "It was
 1946 "not denied that if a person outside the premises had been
 READ "injured in the explosion the defendants would have been
 v. "liable without proof of negligence." I do not agree with this
 J. LYONS & Co., LD. view. In my opinion persons injured by the explosion inside
 Lord Macmillan. or outside the defendants' premises would alike require to aver
 and prove negligence in order to render the defendants liable.

In an address characterized by much painstaking research Mr. Paull for the appellant sought to convince your Lordships that there is a category of things and operations dangerous in themselves and that those who harbour such things or carry on such operations in their premises are liable apart from negligence for any personal injuries occasioned by these dangerous things or operations. I think that he succeeded in showing that in the case of dangerous things and operations the law has recognized that a special responsibility exists to take care. But I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. In my opinion it would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter. In a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe. The first experimental flights of aviators were certainly dangerous but we are now assured that travel by air is little if at all more dangerous than a railway journey. Accordingly I am unable to accept the proposition that in law the manufacture of high-explosive shells is a dangerous operation which imposes on the manufacturer an absolute liability for any

(1) (1944) 170 L. T. 418, 420.

personal injuries which may be sustained in consequence of his operations. Strict liability, if you will, is imposed upon him in the sense that he must exercise a high degree of care, but that is all. The sound view, in my opinion, is that the law in all cases exacts a degree of care commensurate with the risk created. It was suggested that some operations are so intrinsically dangerous that no degree of care however scrupulous can prevent the occurrence of accidents and that those who choose for their own ends to carry on such operations ought to be held to do so at their peril. If this were so, many industries would have a serious liability imposed on them. Should it be thought that this is a reasonable liability to impose in the public interest it is for Parliament so to enact. In my opinion it is not the present law of England.

The mainstay of Mr. Paull's argument was his invocation of the doctrine of *Rylands v. Fletcher* (1), and especially the passage in the judgment of Blackburn J., so often quoted, approved and followed. Adopting and adapting the language of Blackburn J. he said that the respondents here brought on their lands and collected and kept there things likely to do mischief. But the immediately following words used by that eminent judge did not suit so well, for, according to him, the things must be things likely to do mischief if they escape and the duty is to keep them in at peril. In the present case it could not be said that anything had escaped from the respondents' premises or that they had failed in keeping in anything. Mr. Paull was accordingly constrained to paraphrase the words of Blackburn J. and read them as if he had said "likely to do mischief" "if not so controlled as to prevent the possibility of mischief." He invoked, as did Blackburn J. (2) the case of straying cattle as an illustration of such liability. That again, in my opinion, is a special survival with an historical background and affords no analogy to the present case. The doctrine of *Rylands v. Fletcher* (1), as I understand it, derives from a conception of mutual duties of adjoining or neighbouring landowners and its congeners are trespass and nuisance. If its foundation is to be found in the injunction *sic utere tuo ut alienum non laedas*, then it is manifest that it has nothing to do with personal injuries. The duty is to refrain from injuring not alium but alienum. The two prerequisites of the doctrine are that there must be the escape of something from one man's close to another

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(1) L. R. 1 Ex. 265, 279; (2) L. R. 1 Ex. 265, 280.
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 J. LYONS & Co., LD. I have already pointed out that nothing escaped from the defendants' premises and were it necessary to decide the point Lord Macmillan. I should hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives. I could conceive it being said that to carry on the manufacture of explosives in a crowded urban area was evidence of negligence, but there is no such case here and I offer no opinion on the point. It is noteworthy that in *Rylands v. Fletcher* (1) all the counts in the declaration alleged negligence and that on the same page of the report on which his famous dictum is recorded Blackburn J. states that "the plaintiff . . . must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible." His decision for the plaintiff would thus logically seem to imply that he found some default on the part of the defendants in bringing on their land and failing to confine there an exceptional quantity of water. Notwithstanding the width of some of the pronouncements, particularly on the part of Lord Cranworth, I think that the doctrine of *Rylands v. Fletcher* (1) when studied in its setting is truly a case on the mutual obligations of the owners or occupiers of neighbouring closes and is entirely inapplicable to the present case, which is quite outside its ambit.

It remains to say a word about the case of *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (2). There are several features to be noted. Perhaps most important is the fact that the application of the doctrine of *Rylands v. Fletcher* (1) was not contested except on the ground that it was not non-natural to use land in war-time for the manufacture of explosives. Lord Carson said (3) that the liability of the defendant company "was not seriously argued." In the next place it was a case of damage to adjoining property. The explosion caused loss of life but we find nothing in the case about any claim for personal injuries. It is true that Lord Buckmaster stated (4) (what was not contested, except to the

(1) L. R. 1 Ex. 265, 279; L. R. 3 H. L. 330. (3) Ibid. 491.

(2) [1921] 2 A. C. 465. (4) Ibid. 471.

limited extent I have indicated) that the use of the land for the purpose of making munitions was "certainly not the common" and ordinary use of the land" and thus brought the case within the doctrine of *Rylands v. Fletcher* (1), but that was a finding of fact rather than of law. In his enunciation of the doctrine he clearly confined it to the case of neighbouring lands. And the case is open to this further observation that the real contest was not whether there was liability but who was liable, in particular whether two directors of the company which was carrying on the manufacture of munitions were in the circumstances liable as well as the company itself. The case clearly affords no precedent for the present appellant's claim.

Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us "the life of the law has not been logic; it has been experience." For myself, I am content to say that in my opinion no authority has been quoted from case or text-book which would justify your Lordships, logically or otherwise, in giving effect to the appellant's plea. I would accordingly dismiss the appeal.

LORD PORTER. My Lords, the point for decision by your Lordships in this case may be stated in a sentence. It is, are the occupiers of a munitions factory liable to one of those working in that factory who is injured in the factory itself by an explosion occurring there without any negligence on the part of the occupiers or their servants? Normally at the present time in an action of tort for personal injuries if there is no negligence there is no liability. To this rule however the appellant contends that there are certain exceptions, one of the best known of which is to be found under the principle laid down in *Rylands v. Fletcher* (2). The appellant relied upon that case and naturally put it in the forefront of his argument. To make

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(1) L. R. 1 Ex. 265; L. R. 3 (2) L. R. 3 H. L. 330.

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the rule applicable, it is at least necessary for the person whom it is sought to hold liable to have brought on to his premises or at any rate to some place over which he has a measure of control, something which is dangerous in the sense that, if it escapes, it will do damage. Possibly a further requisite is that to bring the thing to the position in which it is found is to make a non-natural use of that place. Such at any rate appears to have been the opinion of Lord Cairns L.C. and this limitation has more than once been repeated and approved—see *Richards v. Lothian* (1), per Lord Moulton. Manifestly these requirements must give rise to difficulty in applying the rule in individual cases and necessitate at least a decision as to what can be dangerous and what is a non-natural use. Indeed, there is a considerable body of case law dealing with these questions and a series of findings or assumptions as to what is sufficient to establish their existence. Amongst dangerous objects have been held to be included, gas, explosive substances, electricity, oil, fumes, rusty wire, poisonous vegetation, vibrations, a flag-pole and even dwellers in caravans. Furthermore, in *Musgrove v. Pandelis* (2) it was held that a motor car brought into a garage with full tanks was a dangerous object, a conclusion, which as Romer L.J. pointed out in *Collingwood v. Home & Colonial Stores, Ltd.* (3) involves the propositions “(1.) that a “motor car is . . . a dangerous thing to bring into a garage, “and (2.) that the use of one’s land for the purpose of erecting “a garage and keeping a motor car there is not an ordinary “or proper user of the land.” My Lords, if these questions ever come directly before this House it may become necessary to lay down principles for their determination. For the present I need only say that each seems to be a question of fact subject to a ruling of the judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances. I do not, however, think that it is necessary for your Lordships to decide these matters now, in as much as the defence admits that high-explosive shells are dangerous things and, whatever view may be formed as to whether the filling of them is or is not a non-natural use of land, the present case can, in my opinion,

(1) [1913] A. C. 263, 280.

(3) (1936) 155 L. T. 550, 553.

(2) [1919] 2 K. B. 43.

be determined upon a narrower ground. In all cases which have been decided, it has been held necessary, in order to establish liability, that there should have been some form of escape from the place in which the dangerous object has been retained by the defendant to some other place not subject to his control. In *Rylands v. Fletcher* (1) it was water, in *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (2), it was explosive matter, in *National Telephone Co. v. Baker* (3), it was electricity, in *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.* (4), it was gas which escaped from the defendants' mains into property belonging to the plaintiff, and so on, in the other instances. In every case, even in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (5), there was escape from the container in which the defendants had a right to carry the dangerous substance, and which they had at least a licence to use, and also an escape into property over which they had no control. Such escape is, I think, necessary if the principle of *Rylands v. Fletcher* (1) is to apply. The often quoted words of Blackburn J. in that case in the Court of Exchequer Chamber (6) are "it seems but reasonable and "just that the neighbour, who has brought something on his "own property which was not naturally there, harmless to "others so long as it is confined to his own property, but which "he knows to be mischievous if it gets to his neighbour's, "should be obliged to make good the damage which ensues "if he does not succeed in confining it to his own property," and in *Howard v. Furness Houlder Argentine Lines, Ltd.* (7), Lewis J. so decided in a judgment with the result of which I agree. The limitations within which the judgment of Blackburn J. confines the doctrine have all been the subject of discussion, more particularly as to who is a neighbour, whether knowledge of the danger is a condition of liability and how far personal injuries are covered, but I know of no case where liability was imposed for injury occurring on the property in which the dangerous thing was confined.

It was urged upon your Lordships that it would be a strange result to hold the respondents liable if the injured person was just outside their premises but not liable if she was just within them. There is force in the objection, but the liability is itself

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(1) L. R. 3 H. L. 330.

(2) [1921] 2 A. C. 465.

(3) [1933] 2 Ch. 186.

(4) [1936] A. C. 108.

(5) [1914] 3 K. B. 772.

(6) L. R. 1 Ex. 265, 280.

(7) 41 Com. Cas. 290.

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an extension of the general rule and, in my view, it is undesirable to extend it further. As Lindley L.J. said in *Green v. Chelsea Waterworks Co.* (1): "That case," (*Rylands v. Fletcher* (2)) "is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." Much of the width of principle which has been ascribed to it is derived not from the decision itself but from the illustrations by which Blackburn J. supported it. Too much stress must not in my opinion be laid upon these illustrations. They are but instances of the application of the rule of strict liability, having for the most part separate historical origins and though they support the view that liability may exist in cases where neither negligence, nuisance nor trespass are to be found, yet it need not as I think necessarily be said that they form a separate coherent class, in which liability is created by the same elements throughout.

I would add that in considering the matter now in issue before your Lordships it is not in my view necessary to determine whether injury to the person is one of those matters in respect of which damages can be recovered under the rule. Atkinson J. thought it was—see *Shiffman v. Order of St. John of Jerusalem* (3), and the language of Fletcher Moulton L.J. in *Wing v. London General Omnibus Co.* (4), where he says: "This cause of action is of the type usually described by reference to the well-known case of *Rylands v. Fletcher* (2). For the purposes of to-day it is sufficient to describe this class of actions as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger," is to the same effect, and, although the jury found negligence on the part of the defendants in *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.* (5), the Court of Appeal applied the rule in *Rylands v. Fletcher* (2) in support of a judgment in favour of the plaintiff for 850*l.* in respect of personal injuries. Undoubtedly the opinions expressed in these cases extend the application of the rule and may some day require examination. For the moment, it is sufficient to say that there must be escape from a place over which a defendant has some measure of control to a place where he has not. In the present case there was no such escape and I would dismiss the appeal.

(1) 70 L. T. 547, 549.

(2) L. R. 3 H. L. 330.

(3) [1936] 1 All E. R. 557.

(4) [1909] 2 K. B. 652, 665.

(5) 34 T. L. R. 500.

LORD SIMONDS. My Lords, it is undeniable that this appeal raises a question of great importance in the law of tort. But I have no doubt how it should be answered and I hope that I shall not be thought wanting in respect to the learned judge who heard the case, or to the careful and far-ranging argument of counsel for the appellant, if I do not deal with every point that has been raised. The appellant claims damages from the respondents for personal injuries received by her in consequence of an explosion upon their premises on August 31, 1942, and founds her claim upon the following pleas: that the respondents "were at all material times the occupiers of certain premises known as the Elstow Ordnance Factory," that "at the said premises the [respondents] carried on the manufacture of high-explosive shells," which "to the knowledge of the [respondents] were dangerous things," and that she "was lawfully in a shell-filling shop at the said premises when a high-explosive shell exploded whereby [she] suffered injuries, loss and damage." My Lords, it does not surprise me that the respondents defended the action by pleading that the statement of claim disclosed no cause of action. For, be it observed, the appellant did not allege negligence on the part of the respondents. That was not an issue in the case. Boldly she averred and by her counsel maintained the averment before this House, that he who lawfully carries on the business of manufacturing high-explosive shells upon his premises is, without proof of negligence, liable to any person lawfully upon those premises who suffers damage by reason of an explosion. For, she said, high-explosive shells are "dangerous things" and the respondents knew it. My Lords, there is, I believe no justification for such a proposition of law nor was any authority cited for it. The approach to it was ingenious, for in the appellant's formal case the question was thus stated "Whether the manufacturer of high-explosive shells is under strict liability to prevent such shells from exploding and causing harm to persons on the premises where such manufacture is carried on as well as to persons outside such premises." The question thus stated assumes that, if the appellant had been outside the premises when she was damaged by the explosion, she would have had a cause of action, and for this assumption it is clear that *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (1) is relied on. That case is an authority binding on your Lordships for whatever it

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decided, but two things at least it did not decide, the first that which is indicated in the question that I have cited, viz., whether the respondents have the same liability to those within as to those outside their premises, the second that the liability, to whomsoever it may be owed, extends to purely personal injuries such as the appellant suffered. (Holding the view that I do upon the first question I think it inexpedient to express a final view upon the second, but I would not be taken as assenting to the proposition that if, e.g., the plaintiff in the *Rainham* case (1) had been a natural person who had suffered personal injury the result would necessarily have been the same)

I turn then to the first question which raises the familiar problem of strict liability, a phrase which I use to express liability without proof of negligence. Here is an age-long conflict of theories which is to be found in every system of law. "A man acts at his peril," says one theory. "A man is not liable unless he is to blame," answers the other. It will not surprise the students of English law or of anything English to find that between these theories a middle way, a compromise, has been found. For it is beyond question that in respect of certain acts a man will be liable for the harmful consequences of those acts, be he never so careful, yet in respect of other acts he will not be liable unless he has in some way fallen short of a prescribed standard of conduct. It avails not at all to argue that because in some respects a man acts at his peril, therefore in all respects he does so. There is not one principle only which is to be applied with rigid logic to all cases. To this result both the infinite complexity of human affairs and the historical development of the forms of action contribute. The House has had the advantage not only of an exhaustive argument in which a large number of cases were cited and discussed and many authoritative text-books and articles quoted, but also of careful and elaborate judgments in the courts below, and I am left with the impression that it would be possible to find support in decision or dictum or learned opinion for almost any proposition that might be advanced. Yet I would venture to say that the law is that, subject to certain specific exceptions which I will indicate, a man is not in the absence of negligence liable in respect of things, whether they are called dangerous or not, which he has brought or collected or manufactured upon his premises, unless such things escape from his premises and, so escaping, injure another, and, as I have already said, I would

(1) [1921] 2 A. C. 465.

leave it open whether, even in the event of such escape, he is liable (still in the absence of negligence) for personal injury as distinguished from injury to some proprietary interest.

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My Lords, in this branch of the law it is inevitable that reference should be made to what Blackburn J. said in *Fletcher v. Rylands* (1) and what Lord Cairns L.C. said in *Rylands v. Fletcher* (2). In doing so I think it is of great importance to remember that the subject-matter of that action was the rights of adjoining landowners and, though the doctrine of strict liability there enforced was illustrated by reference to the responsibility of the man who keeps beasts, yet the defendant was held liable only because he allowed, or did not prevent, the escape from his land on to the land of the plaintiff of something which he had brought on to his own land, and which he knew or should have known was liable to do mischief if it escaped from it. I agree with the late MacKinnon L.J. (3) that this and nothing else is the basis of the celebrated judgment of Blackburn J., and I think it is no less the basis of Lord Cairns' opinion. For it is significant that he emphasizes (4) that, if the accumulation of water (the very thing, which, by its escape in that case, caused the actionable damage) had arisen by the natural user of the defendant's land, the adjoining owner could not have complained. The decision itself does not justify the broad proposition which the appellant seeks to establish, and I would venture to say that the word "escape" which is used so often in the judgment of Blackburn J. meant to him escape from the defendant's premises and nothing else. It has been urged that escape means escape from control and that it is irrelevant where damage takes place if there has been such an escape, but, though it is arguable that that ought to be the law, I see no logical necessity for it, and much less any judicial authority. For, as I have said, somewhere the line must be drawn unless full rein be given to the doctrine that a man acts always at his peril, that "coarse and impolitic idea" as Holmes J. somewhere calls it. I speak with all deference of modern American text-books and judicial decisions, but I think little guidance can be obtained from the way in which this part of the common law has developed on the other side of the ocean, and I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability

(1) L. R. 1 Ex. 265.

(3) [1945] K. B. 216, 242

(2) L. R. 3 H. L. 330.

(4) L. R. 3 H. L. 330, 338

H. L. (E.) for its consequences to all men everywhere. On the contrary I would say that his obligation to those lawfully upon his premises is to be ultra-cautious in carrying on his ultra-hazardous activity, but that it will still be the task of the injured person to show that the defendant owed to him a duty of care and did not fulfil it. It may well be that in the discharge of that task he will sometimes be able to call in aid the maxim "res ipsa loquitur."

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My Lords, I have stated a general proposition and indicated that there are exceptions to it. It is clear for instance that if a man brings and keeps a wild beast on his land or a beast known to him to be ferocious of a species generally mansuetæ naturæ he may be liable for any damage occurring within or without his premises without proof of negligence. Such an exception will serve to illustrate the proposition that the law of torts has grown up historically in separate compartments and that beasts have travelled in a compartment of their own. So also it may be that in regard to certain chattels a similar liability may arise though I accept and would quote with respect what my learned and noble friend Lord Macmillan said in *Donoghue v. Stevenson* (1): "I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety." There may be other exceptions. Professor Winfield, to whose Textbook of the Law of Tort, 3rd ed., I would acknowledge my indebtedness, is inclined to include certain "dangerous structures" within the rule of strict liability. This may be so. It is sufficient for my purpose to say that unless a plaintiff can point to a specific rule of law in relation to a specific subject-matter he cannot, in my opinion, bring himself within the exceptions to the general rule that I have stated. I have already expressed my view that there is no rule which imposes on him who carries on the business of making explosives, though the activity may be "ultra-hazardous" and an explosive "a dangerous thing," a strict liability to those who are lawfully on his premises.

My Lords, it was urged by counsel for the appellant that a decision against her when the plaintiff in the *Rainham* case (2) succeeded would show a strange lack of symmetry in the law. There is some force in the observation. But your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law,

(1) [1932] A. C. 562, 611, 612.

(2) [1921] 2 A. C. 465.

the law of nuisance, in which also negligence is not a necessary ingredient in the case. For if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land. To confine the rule in *Rylands v. Fletcher* (1) to cases in which there has been an escape from the defendants' land appears to me consistent and logical. It is worthy of note that so closely connected are the two branches of the law that text-books on the law of nuisance regard cases coming under the rule in *Rylands v. Fletcher* (2) as their proper subject, and, as the judgment of Blackburn J. in that case itself shows, the law of nuisance and the rule in *Rylands v. Fletcher* (1) might in most cases be invoked indifferently. One typical illustration will suffice. In *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (3) it was the rule in *Rylands v. Fletcher* (1) that was relied on by the Court of Appeal; but the authority of *Midwood & Co., Ltd. v. Manchester Corporation* (4) was invoked and that was a case of nuisance and nothing else. In suggesting to your Lordships that except in reference to specific subject-matter the rule in *Rylands v. Fletcher* (1) must be confined to the escape of something from the defendant's premises I am pressed by the fact that in the *Charing Cross* case (3) the escape was not strictly from the defendant's premises but from pipes laid in the soil of another. So also in *West v. Bristol Tramways Co.* (5) the escape was of creosote from wood-blocks laid in the highway. It is not necessary to pronounce finally upon these cases. It is possible that the rule should be extended to include the case where something has escaped from a pipe or whatever it may be which has been laid and maintained by the defendant by virtue of some right or franchise in the land of another. That is not this case. Nor would I exclude the possibility of a special rule being applicable as between co-users of a highway, for the highway has a law of its own. But that also is not this case. For the present purpose it is sufficient to say negatively that the appellant being on the respondents' premises cannot hold them liable for the damage suffered by her unless she alleges and proves negligence by them in their manufacture of explosives.

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(1) L. R. 3 H. L. 330.

(4) [1905] 2 K. B. 597.

(2) [1945] K. B. 216, 242.

(5) [1908] 2 K. B. 14.

(3) [1914] 3 K. B. 772.

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The respondents had a second line of defence on the maxim "*volenti non fit injuria*," but this was not maintained before this House. It was made clear that the appellant was upon the respondents' premises only because, being registered under the National Service Acts, she was required to work there as an employee of the Armament Inspection Department of the Ministry of Supply. Had she been a free agent she would not have remained there. I content myself by saying that I see no ground for dissenting from the opinion of Cassels J. on this point. It is not, I think, the law of England that the will of a directing official of a government department becomes the will of the unwilling citizen whom he directs.

LORD UTHWATT. My Lords, the appellant does not allege either negligence or lack of skill on the part of the respondents. Her case is that by reason of the dangerous nature of the business which involved the risk of explosion they owed to her a duty to safeguard her from any harm resulting from its dangerous character. In substance the appellant was on the respondents' premises in performance of a statutory duty incumbent on her as a citizen, but it is, I think, obvious that this circumstance did not alter the nature of the duty which the respondents owed to her as a person who with their consent was present on their premises on business bent.

At the trial and in the Court of Appeal the respondents raised the defence that the appellant voluntarily incurred the risk of explosion as a risk incident to her employment and that the rule embodied in the maxim *volenti non fit injuria* barred her claim. That defence found no favour in the courts below and was abandoned, and, in my opinion, rightly abandoned, in this House. The appellant willed what she did, but her will was determined for her. Consent by the appellant to exempt the respondents from any duty they owed to her cannot be implied.

The only question at issue, therefore, is whether the respondents owed to the appellant the absolute duty for which the appellant contends. In my opinion they did not. There is much authority on the extent of the duty which an occupier of land owes to a person who, for one reason or another, is found on the occupier's land. The background is the original freedom of the landowner, keeping within his own bounds, to do what he liked with and on his own, the King's law, save in felonies and trespass actions, stopping at his boundary. With the develop-

ment of the law and the appearance of the conception of negligence as a general ground of liability, that freedom of action without liability for resulting harm has been curtailed, and to the rights of a landowner, now represented by the occupier, there have been attached the duties of a host. The result is that there is no general standard of duty. The circumstances attending the presence of the stranger have to be taken into account and determine the duty owed. Put broadly, the trespasser can complain of uncivilized conduct, and if a child, of the fascinations offered by the occupier's land, to which, with resulting damage to himself, he has not unnaturally succumbed ; the demands of a polite society are thereby satisfied ; the bare licensee is entitled to assume that the gift to him possesses its face value as the occupier sees it but cannot otherwise call for a review of its character ; courtesy is not to be repaid by ingratitude : and to the licensee with an interest commonly called an invitee (and the appellant comes within this class of invitees) a duty of care is owed, the reason being that the invitee may reasonably expect his interests to be considered. (The animal cases so far as they relate to injuries suffered on the occupier's property I regard as exceptional. They state rules not in themselves irrational, but do not exemplify any general principle.) The common feature of the duties so far imposed on the occupier is that there is demanded of him a standard of conduct no higher than what a reasonably minded occupier of land, with due regard to his own interests, might well agree to be fair and no lower than a trespasser, bare licensee or invitee might in a civilized community reasonably expect.

Is there any good reason consistent with respect for the rights of dominion and user incident to the occupation of land, and with an appreciation of the position of an invitee for subjecting the occupier carrying on a dangerous but lawful business to an absolute duty to safeguard the invitee from harm ? I can see none. In carrying on such a business the occupier may be doing something which is not common, but he is not doing anything which is out of the ordinary course of affairs or which is concealed from the invitee. He is in no way abusing his right to use his land. To subject him to an absolute duty to an invitee would be to my mind to impose an unreasonable limitation on the due exercise of that right. But the relation between the parties is the governing consideration and it is the incidents which the law attaches to that relation that are in question. I can understand an invitee, whatever be the nature

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of the business carried on, questioning in his own mind whether he is entitled to expect that the occupier will in conducting his business take due care or whether he is to expect only that the occupier will continue to conduct his business in his accustomed manner, whatever that may be. But I do not think that the invitee, any more than the occupier, would assume that, by reason only of the dangerous nature of the business carried on, the occupier guaranteed him freedom from harm. If that be so it is against reason that the law, whose function it is to give effect to reasonable expectations, should impose such a guarantee. A measure of care determined by the degree of danger is in my opinion the utmost that either party would envisage and, in my opinion, the law demands that and no other standard of duty. This denial of absolute liability to an invitee is indeed not inconsistent with the assertion—I do not make it—of an absolute duty towards persons who suffer harm outside the occupier's premises. Matters happening within one's own bounds are one thing and matters happening outside those bounds are an entirely different thing. In the latter case the personal relation is absent and the occupier's dominion over and right to use his land have to be reconciled with the rights of others to use or be present on adjoining lands not subject to his dominion. Unless compelled by authority to come to a contrary conclusion I would, therefore, reject the appellant's contention.

There is no authority which directly supports that contention. The appellant, to some extent, relied on the animal cases, but they are of no real help. Her sheet anchor was *Rylands v. Fletcher* (1). That case on the facts related only to the duty which an occupier of land—nuisance and negligence not being involved and trespass treated as not being involved—owed to an occupier of other land in respect of an intrusion from the land of the one to the land of the other. The accommodation between occupiers of land there laid down was that things liable to escape must be kept by an occupier within his bounds unless their presence within those bounds was due to a natural use of his land. The liability and the excuse both relate to the use of land as affecting other land. I do not regard *Rylands v. Fletcher* (1) as laying down any principle other than a principle applicable between occupiers in respect of their land or as reflecting an aspect of some wider principle applicable to dangerous businesses or dangerous things. For the purposes of

(1) L. R. 3 H. L. 330.

my opinion, therefore, it is unnecessary to consider whether or not the use of land here in question was a natural use but I desire to express my agreement with the observations which the noble and learned Lord on the woolsack has made with reference to *Rickards v. Lothian* (1) and *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* (2). I would only add that "natural" does not mean "primitive."

The decision of Lewis J. in *Howard v. Furness Houlder Argentine Lines, Ltd.* (3) is adverse to the appellant's contention, and there is a statement in *Membery v. Great Western Ry. Co.* (4) which, as I read it, is adverse to it. In that case the railway company agreed with a contractor that he should shunt their engines, he supplying horses and men, the company providing boys to help, when they had boys available, and, when they had not, the shunting to be done without boys. The operation of shunting was dangerous to any man performing it without the assistance of boys. While engaged in shunting without a boy, the plaintiff, an employee of the contractor, was without negligence on his part injured by a truck running over him. The plaintiff, who was in the circumstances an invitee, based his case on negligence, and somewhat surprisingly won in the court of first instance. Lord Herschell, however, took the opportunity of making a statement of his conception of the duties of an occupier to an invitee. He said: "Now I do not for a moment doubt that there was a duty incumbent upon the defendants towards the plaintiff at the time when he was upon their premises. They were not without duty towards him. But it is not enough to arrive at the conclusion that there was a duty, or even a duty to take care; the extent of that duty requires to be determined. My Lords, I cannot doubt that they were bound to take care that the machinery, or appliances, or tackle of theirs, which he had to use in the course of his discharge of those duties in which they were interested, were in a reasonably fit and proper condition; and certainly if they were not in such a condition, and if the defect in them was unknown to the plaintiff, I cannot doubt that the plaintiff would have his remedy against them. In addition to that, I think they were under the duty to him, having invited him upon their premises, not to permit their premises to be in such a condition that he unwittingly

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(1) [1913] A. C. 263.

(2) [1921] 2 A. C. 465.

(3) 41 Com. Cas. 290.

(4) (1889) 14 App. Cas. 179, 191.

H. L. (E.) "might fall into a trap of the existence of which he,
 "unacquainted with their premises, would be ignorant, by
 1946 "which he might sustain an injury. Further than that, it
 READ "might be (and I confess that I should myself be disposed to
 v. "think that it was) their duty to take due and reasonable care
 J. LYONS "that in the carrying on of their business they did not subject
 & Co., LD. "him to unreasonable risk owing to the acts which they did
 Lord Uthwatt. "in the carrying on of that business. If they were carrying
 "on a dangerous business, and one which would subject people
 "employed upon their premises for their benefit to risk, they
 "must take reasonable care, as it seems to me, that they do not
 "do any act (I emphatically use the word 'act') which would
 "endanger the safety of the persons who thus, to their
 "knowledge, are employed about their business upon their
 "premises." I understand the latter part of this dictum as
 emphasizing that in relation to a dangerous business a duty of
 care to an invitee is demanded from the undertaker, but that a
 claim based only on the dangerous nature of the business is not
 admissible. So understood, I agree with it. I would dismiss
 the appeal.

Appeal dismissed.

Solicitors for appellant : *L. Bingham & Co.*

Solicitor for respondents : *Treasury Solicitor.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF CEYLON.

*Ceylon — Land — Compulsory acquisition — Strip between street lines
 — Compensation — Assessment — "Market value" — Land
 Acquisition Ordinance (Legislative Enactments of Ceylon, c. 203),
 s. 21 (a)—Housing and Town Improvement Ordinance (Legislative
 Enactments of Ceylon, c. 199), s. 19, sub-s. 1.*

* *Present* : LORD WRIGHT, LORD PORTER, LORD UTHWATT, SIR
 MADHAVAN NAIR and SIR JOHN BEAUMONT.

While the effect of the inclusion of a strip of the respondent's land between street lines laid down under the Housing and Town Improvement Ordinance of Ceylon prevented the strip from being dealt with as building land, that consideration did not render it sterile and valueless, for it could have been used for any purpose which did not involve the erection of a building, and, in determining the compensation payable on the subsequent compulsory acquisition of the strip by the appellant municipal authority, the Government Agent and the court were required by s. 21 of the Land Acquisition Ordinance of Ceylon to take into consideration first the market value of the land at the time of awarding compensation. The market value—the price which a willing vendor might be expected to obtain from a willing purchaser—included the value of tenements, a wall and trees on the acquired strip, and also the loss of income from stalls which could be placed on it during festivals. The fact that the vendor owned other land in the neighbourhood was irrelevant for the purpose of ascertaining the market value of the land to be acquired, though that fact would be the foundation of a claim under heads (b) and (c) of s. 21 for damages for severance and other injurious affection to his property by reason of the acquisition.

Government Agent, Western Province v. Archbishop (1913) 16 N. L. R. 395 and *Government Agent, Kandy v. Marikar Saibo* (1911) 6 S. C. D. 36, which laid down the principle that in a case in which a small strip of land of little intrinsic value, forming part of a larger estate of the owner, was compulsorily acquired, the proper method of valuing it was to ascertain the market value of the entire estate and to assign to the land acquired a proper proportion of that value, held wrongly decided. To value the acquired strip on that basis was to attempt to ascertain the loss sustained by the owner by reason of the acquisition, and not the market value of the acquired land, and was a method which found no warrant in the Ordinance.

Sub-section 1 of s. 19 of the Housing and Town Improvement Ordinance is concerned with the lines of what is physically a street, and not with land between street lines which is not a street.

Decree of the Supreme Court of Ceylon set aside.

APPEAL (No. 25 of 1946), by special leave, from a decree of a Divisional Bench of the Supreme Court of the Island of Ceylon (December 17, 1942) which set aside a decree of the District Court of Colombo (March 9, 1942.)

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. At all material times the respondent was the trustee and, as such, the owner of a Hindu temple known as "Palaya Kadiresan Kovil," situate in Colombo. The temple premises comprised an area of a little over eleven acres, bounded on the west by a road called Bambalapitiya Road and on the south by Vajira Road which,

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before the present acquisition proceedings, was of a width varying from eight to twelve feet. On August 8, 1919, the appellants, by resolution passed pursuant to s. 19, sub-s. 4, of the Housing and Town Improvement Ordinance, defined street lines for Vajira Road designed to secure a uniform width of forty feet for such road and, in the year 1942, the appellants compulsorily acquired, under the Land Acquisition Ordinance, the land of the respondent situate within such building lines. The piece of land so acquired (which is hereinafter referred to as "the acquired strip") was a strip of land 1,140 feet long with a width of between twenty-eight and thirty-two feet, and embraced an area of two roods, 37.2 perches, that is, just under three-quarters of an acre. It formed part of the respondent's estate before referred to. For the land so acquired the appellants, pursuant to the provisions of the Land Acquisition Ordinance, offered, or caused to be offered, to the respondent, compensation amounting to Rs. 14,500, made up as follows:—

	Rs.
(a) Tenements on the acquired strip	2,700.00
(b) An old boundary wall thereon	6,840.00
(c) Trees thereon	1,008.50
(d) The land comprising the acquired strip (token value)	5.00
	10,553.50
plus:—	
(e) Ten per cent. of Rs. 10,553.50 for compulsory purchase	1,055.35
(f) Loss of income from certain stalls placed on the land during festivals	2,800.00
	14,408.85
(g) Sum added by appellants for sake of round figures	91.15
Total	14,500.00

Of those figures, the only one which was challenged by the respondent was the sum of Rs. 5.00, stated to be the value of the land acquired.

The offer of the appellants was not accepted by the respondent and, accordingly, reference was made to the District

Judge under the Ordinance. On such reference the respondent claimed a sum of over Rs. 56,000, based on the contention that the acquired strip should be valued as first-class building land, it being agreed that the proper value of land of that class in the locality was Rs. 50,000 per acre. In the alternative, the respondent claimed that if no building could in law be erected on the acquired strip the compensation should be approximately Rs. 21,900.

At the hearing the assessors differed in their opinions, and the District Judge accepted the value placed on the acquired strip by the appellants. Accordingly, on March 9, 1942, he passed a decree that the compensation payable to the present respondent in respect of the portion of land already acquired by the present appellants and for the building, trees, boundary wall and loss of income from stalls was Rs. 14,500, which included ten per cent. for compulsory purchase. The respondent was ordered to pay the costs of the appellants.

From that decision the respondent appealed to the Supreme Court, and the appeal was heard by Howard C.J., Soertsz and Keuneman J J. Soertsz J. was of opinion that the inclosing of the acquired strip between street lines did not have the effect of preventing it from being used and valued as building land, and he was impressed with what he considered to be the injustice involved in a contrary view. "It is contended," he said, "that the effect, in law, of the laying down of this "street line, was to make it impossible for a building or any "part of a building to be erected on the land within that line, "and that consequently, that piece of land ceased to have any "market value at all, and had to lie sterile till such time as the "Council should think fit to take it over as a gift or release it "from this deadly incubus." Applying the principle which had been laid down by the Supreme Court in *Government Agent, Western Province v. Archbishop* (1), that, in a case in which a small strip of land of little intrinsic value, forming part of a larger estate of the owner, was acquired, the proper method of valuing it was to ascertain the market value of the entire estate and to assign to the land acquired a proper proportion of that value, he valued the whole estate of the respondent at the rate of Rs. 50,000 an acre, assigned to the acquired strip a part of the total value proportionate to its acreage, and, after making certain deductions which he thought reasonable, assessed the compensation payable to the respondent at

(1) (1913) 16 N. L. R. 395.

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Rs. 28,242. The Chief Justice agreed with Soertsz J. and, in a short judgment, based his opinion on the principle followed by the court in *Government Agent, Western Province v. Archbishop* (1), and in an earlier case to the same effect, *Government Agent, Kandy v. Marikar Saibo* (2). Keuneman J. took a different view. He thought that the inclosing of the acquired strip within building lines had the effect of preventing it from being built on, and that it could not therefore be valued as building land. He did not dispute the principle laid down in *Government Agent, Western Province v. Archbishop* (1), but thought that the principle could not be applied in the present case since the acquired strip had a legal restriction placed on it in relation to building which did not apply to the rest of the land. He expressly stated that it would not be correct to value the strip as a separate entity since, on account of its shape and size, it might be of no value to a prospective purchaser. He considered, however, that the evidence which had been called for the respondent showed that a possible development of the respondent's estate would be by building houses on it, the gardens or yards of which might include the acquired strip, and that the compulsory acquisition of such strip would deprive the respondent of that advantage. On that basis he awarded compensation amounting to Rs. 19,360.

In the result the Supreme Court passed a decree setting aside the order of the District Court and entering judgment for the present respondent in the sum of Rs. 28,242. It was ordered that the present appellants pay to the present respondent his taxed costs of the appeal, and also one-third of his taxed costs in the District Court. From that decree the present appeal was brought.

By the Land Acquisition Ordinance it was provided, so far as material, by s. 3, that whenever it should appear to the Governor that land in any locality was likely to be needed for any public purpose it should be lawful for the Governor to direct the Surveyor-General to examine such land and report whether the same was fitted for such purpose. By s. 5 the Surveyor-General was required to make his report, and on receipt thereof the Governor might direct the Government Agent to take order for the acquisition of the land. By s. 6 the Government Agent was required to give notice that the Government proposed to take possession of the land, and that claims to compensation from all interested in such land might

(1) 16 N. L. R. 395.

(2) [(1911) 6 S. C. D. 36.]

be made to him. By s. 7 the Government Agent was required on the day fixed for the inquiry to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed therefor, and to tender such amount to the persons interested who had attended the inquiry. Section 8 provided that in determining the amount of compensation the Government Agent should take into consideration the matters mentioned in s. 21, and should not take into consideration any of the matters mentioned in s. 22. Section 11 provided, so far as material, that when the Government Agent proceeded to make inquiry as aforesaid, if he was unable to agree with the persons interested as to the amount of compensation to be allowed he should refer the matter to the determination of the District Court in manner hereinafter appearing. A later section provided that the reference to the District Court should be heard by the District Judge and two assessors and, if the assessors did not agree, the opinion of the judge was to prevail. Section 21 was in these terms:—"In determining the amount of compensation to be awarded for land acquired under this Ordinance, the District Judge and assessors shall take into consideration—

"(a) firstly, the market value at the time of awarding compensation for such land ;

"(b) secondly, the damage (if any) sustained by the person interested at the time of awarding compensation, by reason of severing such land from his own land ;

"(c) thirdly, the damage (if any) sustained by the person interested at the time of awarding compensation, by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his earnings ; and

"(d) fourthly, if in consequence of the acquisition he is compelled to change his residence, the reasonable expenses (if any) incidental to such change."

Section 22 directed that the judge or assessors should not take into consideration the matters enumerated under seven heads. The only one which might be regarded as relevant to the present appeal was the sixth:—"Any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put." Section 26 provided that if the Government Agent, or any person interested, was dissatisfied with any award made by the

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court under the provisions of the Ordinance, he might appeal therefrom to the Supreme Court.

By the Housing and Town Improvement Ordinance it was provided, so far as material :—

Section 5. “ No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings, and specifications approved in writing by the Chairman.”

Section 7. “ (1.) The Chairman shall not—

“ (a) approve any plan or specification of any building ; or

“ (b) consent to any alteration in any building, which shall conflict, or cause such building to conflict, with the provisions of this or any other Ordinance.”

Section 19, so far as material, was in these terms. “ (1.) Every building erected or re-erected after the commencement of this Ordinance within the administrative limits of any local authority—

“ (a) shall be erected either upon the line of an existing street not less than twenty feet in width, or upon the line of a new street defined or approved by the Chairman or otherwise authorized under this or any other Ordinance ; and

“ (b) shall either abut upon the street or have all the land between at least one face of such buildings and the street reserved for the use of the building.

“(4.) The local authority may by resolution from time to time, subject to the standards prescribed by r. 8 of the schedule, define the lines by which any existing street or any part or continuation thereof shall be bounded, and the lines so defined shall be deemed to be the lines of the street.

“ Where application is made for sanction to re-erect any building which projects beyond any street line so defined or to re-erect any part thereof which so projects, the Chairman may require that such building shall be set back to the street line : ”

The section then contained certain provisions and definitions not relevant to this appeal.

Section 108 provided that “ (1.) No person shall erect any masonry boundary wall or gateway—

“ (a) within the street lines of any street for which street lines have been defined ; or

“ (b) in the case of any street for which no street lines have been defined, within twenty feet of the centre of the street,

"unless in such case he shall have received the written permission of the Chairman."

Rule 8 of the schedule required that every new street intended for carriage traffic which was defined or approved by a local authority or a Board of Improvement Commissioners should be of not less than forty feet in width.

1946. Dec. 10, 11. *Pritt K.C., de Silva K.C. and Handoo* for the appellants. The Housing and Town Improvement Ordinance intended that nothing shall be built beyond the line of the street; there is no express provision to that effect, but it should be implied from the provisions of the Ordinance. Where a piece of land has two road frontages, in respect of both of which "street lines" have been sanctioned, the provisions of s. 19, sub-s. 1 (a), of the Ordinance apply in respect of both frontages, and new buildings must be so erected as not to project beyond any sanctioned street line. Land within the limits of "street lines" sanctioned under the Ordinance cannot lawfully be built on, or used as an appurtenance to a building on adjacent land, and thus have a market value as a building site. The points for consideration under the Land Acquisition Ordinance are, market value, severance, injurious affection and incidental expenses. Only the first—market value—is relevant here. With regard to severance, the respondent never raised the proposition in any shape or form that compensation should be paid for severance. When what is severed is about one-fifteenth of the respondent's land, it would not be easy to make a case that his remaining ten and a quarter acres have really suffered by the severance. The only conceivable injury inflicted on him on severance is that the boundary wall would have to be removed and something placed on the new wall line, but in respect of that he was tendered Rs. 6,840 by the appellants, which, seeing that he made no claim for it, was generous justice. No case was made either in respect of injurious affection. With regard to market value, where land within the limits of "street lines," which is compulsorily acquired under the Land Acquisition Ordinance, forms part of a larger piece of land, the market value of the compulsorily acquired portion is not to be ascertained by reference to the value of the rest of the piece which is, and remains, unaffected by the restrictions created by the Housing and Town Improvement Ordinance. The appellants gave clear and positive evidence, on a fairly correct basis, that the market value of this land was nothing—

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evidence that was accepted by the trial court—and the respondent has chosen to give no evidence except that one of his witnesses said that the land was worthless. While the appellants say that the land was worth nothing, they have given the respondent Rs. 14,500 on items which, in truth, are only relevant to the market value. In the circumstances the right and proper course is to say that, unsatisfactory as the proceedings were in many ways, it is for the claimant to show that he is entitled to something more than Rs. 14,500, and there is nothing in the Record to show that. The authorities referred to in the courts below do not help or hinder my case.

Rewcastle K.C. and *T. B. W. Ramsay* (for *Chinna Durai*) for the respondent. If the decision of the trial judge is right a curious result follows, for it means that the appellant municipality, by fixing these street lines, can sterilize the land within them, which then becomes of no value, and they can then at their leisure, acquire it without payment of any compensation. That may be stated as a general proposition if the view of the trial judge is right, because in all cases of this type a long narrow strip of frontage is left, which would be sterilized land, and no compensation payment will ever have to be made for land acquired for street widening. It is not contended that once a building line is fixed the landowner can build beyond it, but that mere fact does not make the land within it valueless. After the line has been fixed, and before acquisition, there are a number of purposes to which the strip could be put—erection of stalls, and so on. The trial judge ought to have said that it had some reduced value, and also that the holding of the adjacent land was worth less without this strip, and that that entitled him to something for severance; he ought to have given compensation on the basis of those two things added together. It is wrong to assume that because the land cannot be built on it is, therefore, of no value. The Board is invited to make an approximation as to the value of the strip. The appellants have not established a measure of compensation as required by the Act; “market value” is the value to an outside person.

Pritt K.C. replied.

1947. Jan. 28. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT. This appeal from a decree, dated December 17, 1942, of the Supreme Court of the Island of

Ceylon, raises certain questions as to the construction and effect of the Land Acquisition Ordinance (ch. 203, Legislative Enactments of Ceylon) and of the Housing and Town Improvement Ordinance (ch. 199, Legislative Enactments of Ceylon) and it will be convenient at the outset to refer to the material provisions of these enactments. [His Lordship then set out the relevant provisions of the Land Acquisition Ordinance and of the Housing and Town Improvement Ordinance, and stated the facts, as set out above, and continued :] In their Lordships' opinion the cases of *Government Agent, Western Province v. Archbishop* (1) and *Government Agent, Kandy v. Marikar Saibo* (2), were wrongly decided, and this has occasioned error throughout the proceedings in Ceylon. Section 21 of the Land Acquisition Ordinance requires the Government Agent and the court to take into consideration first the market value of the land to be acquired at the time of awarding compensation. The market value is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser. The owner of the land, who is notionally the vendor, cannot also be the purchaser, and the fact that he owns other land in the neighbourhood is irrelevant for the purpose of ascertaining the market value of the land to be acquired, though such fact is the foundation of a claim under heads (b) and (c) of s. 21, for damage for severance and other injurious affection to his other property by reason of the acquisition. The Supreme Court, in valuing the acquired strip as part of the rest of the land of the respondent which is not either actually or notionally in the market, have not ascertained the market value of the acquired strip; they have attempted to ascertain the loss which the respondent has sustained by reason of the acquisition of the acquired strip. That method finds no warrant in the Ordinance.

Bearing in mind the terms of s. 21 of the Ordinance, it is clear that the offer by the appellants to the respondent of Rs. 14,500 for the acquired strip, whilst it may have been justified in the result, was arrived at on a wrong basis. The value of the tenements, the wall, and the trees on the acquired strip, should have been included in the market value of the strip; so also should the loss of income from stalls which could be placed on the land during festivals, since that is a matter which a purchaser would take into account if he were buying the strip. The respondent might have claimed compensation under

(1) 16 N. L. R. 395.

(2) 6 S. C. D. 36.

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s. 21 (b) for the cost of erecting a new boundary wall between his land and Vajira Road, but he did not do so. It would appear, however, from the evidence that the value placed by the appellants on the old boundary wall was really based on the cost of building a new wall. In the District Court it was not open to the District Judge to vary the basis of the award except as claimed by the respondent and, as he rejected the respondent's claim, he had no alternative but to uphold the award.

Their Lordships are quite unable to agree with the reasoning or the conclusion of Soertsz J. in the Supreme Court. They feel no doubt that the effect of the inclusion of the acquired strip between street lines was to prevent it from being dealt with as building land. It is true that the only express prohibition against building on land within street lines is that contained in s. 108 of the Housing and Town Improvement Ordinance, which deals only with boundary walls and gateways, but, in their Lordships' view, the effect of s. 5, which provides that no person shall erect any building within the limits administered by a local authority, except in accordance with plans approved in writing by the Chairman, and of s. 7, which prohibits the Chairman from approving any plan of any building which shall conflict with the provisions of the Ordinance, ensures that no purchaser would buy land between street lines with a view to building on it. However, this consideration does not render the land sterile and valueless as Soertsz J. thought. It can be used for any purpose which does not involve the erection of a building. In the case of the acquired strip, it is probable that its inclusion within street lines had little, if any, effect on its market value since, from its size and shape, it was obviously unsuitable for development as a building site. Any claim to compensation based on loss of building value in the acquired strip would have to be made under heads (b) or (c) of s. 21, and based on evidence that the acquisition of the acquired strip has prejudiced the development of the other land of the respondent as a building estate.

Keuneman J., as already indicated, took a different view, and thought that the acquired strip could not be built on. In effect, though not in terms, the basis on which he assessed compensation was that of injurious affection to the other land of the respondent. This is a legitimate basis but, in their Lordships' view, the damage assessed by the learned judge has not been proved. A surveyor called by the respondent

suggested that the respondent's land might be developed by building on it small houses, with gardens or yards, which could embrace the acquired strip and that, in this way, the acquired strip could be made use of without being built on, and so possessed a substantial value, and the learned judge accepted this view. There was, however, no evidence, nor, indeed, any suggestion, that the respondent intended or had ever contemplated developing his land in this way. Nor was there any evidence that such development would be more advantageous than other methods of development in which buildings might be erected abutting direct on the widened Vajira Road. There was no evidence that the eleven acres bounded by the narrow Vajira Road which the respondent formerly possessed were any more valuable than the ten and a quarter acres bounded by a forty foot road which the respondent will in future possess.

Their Lordships heard a long argument on behalf of the appellants as to the meaning and effect of s. 19, sub-s. 1, of the Housing and Town Improvement Ordinance, the contention being that that sub-section by implication forbade building within the limits of street lines. In their Lordships' view that sub-section is concerned with the lines of what is physically a street, and not with land between street lines which is not a street. They think it unnecessary, therefore, to discuss that sub-section.

Both parties expressed their unwillingness to the remission of this case to the authorities in Ceylon to start the proceedings de novo on the correct basis, and their Lordships think there would be no advantage in adopting such a course. It is probable that a fresh offer made by the appellants, founded on a correct basis, would not differ materially from the previous offer, and their Lordships can see nothing in the evidence to suggest that that offer was inadequate. Their Lordships think that, in view of the course which the proceedings took in Ceylon, and of the fact that leave to appeal to their Lordships' Board was sought by the appellants to obtain a ruling as to the construction of the Ordinances involved, the fair course is to allow each party to bear his or their own costs throughout.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed, that the decree of the Supreme Court of Ceylon, dated December 17, 1942, be set aside, and that the decree of the District Court, dated March 9, 1942,

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so far as it orders that the compensation payable to the respondent is Rs. 14,500 be restored. There will be no order as to costs throughout the proceedings.

Solicitors for appellants : *Burchells*.

Solicitors for respondent : *Hy. S. L. Polak & Co.*

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[PRIVY COUNCIL]

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CHITTAMBARAM APPELLANT ;

AND

KING-EMPEROR RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT RANGOON.

Burma—Emergency legislation—Assumption of legislative powers by Governor—Criminal law—Appointment of Special Judge—Special Judges Act (Burma Act X of 1943)—Validity—Government of Burma Act, 1935 (26 Geo. 5, c. 3), ss. 84, 139, sub-s. 1, proviso.

The Governor of Burma, on December 10, 1942, at Simla, the seat of the Government of Burma during the occupation of Burma by the Japanese, issued a proclamation pursuant to the powers conferred by s. 139, sub-s. 1, of the Government of Burma Act, 1935, assuming to himself all powers vested by or under the Act of 1935 in the legislature of Burma or in either Chamber thereof. In 1943, in purported exercise of those powers he enacted the Special Judges Act, 1943, an emergency and temporary Act which provided for the appointment of special judges for the trial of offences during the then emergency, and which, in effect, and contrary to the pre-existing law, had the result, inter alia, of depriving an accused person tried thereunder of a hearing before a magistrate, trial by jury, and a right of appeal :—

Held, that the Special Judges Act, 1943, was intra vires the Governor of Burma. By the emergency powers given to him by s. 139 of the Act of 1935, and in virtue of the proclamation whereby he had assumed to himself the powers vested in the legislature under that Act, he could validly and legally change the pre-existing system of jurisdiction—described in s. 84 of the Act of 1935, and therein expressed to be subject to the provisions of any Act of the

* *Present* : LORD WRIGHT, LORD PORTER, LORD SIMONDS, LORD UTHWATT and SIR JOHN BEAUMONT.

legislature—to the extent effected by the Special Judges Act, which was, in truth, an Act of the legislature. The Governor did not by the Special Judges Act interfere with the High Court or its jurisdiction, and accordingly he had not infringed the provisions of the proviso to sub-s. 1 of s. 139 of the Act of 1935, which provided that nothing in that Act should authorize him to assume to himself any of the powers vested in or exercisable by the High Court. There was nothing to give exclusive jurisdiction to the High Court, and no law to prohibit the legislative authority in Burma from establishing a new or collateral court.

Order of the High Court at Rangoon affirmed.

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APPEAL (No. 89 of 1946), by special leave, from an order (March 26, 1946) by Dunkley A.C.J. of Burma, nominated by the Governor of Burma as a judge of the High Court to review the proceedings in which the appellant had been convicted of, and sentenced to death for, murder under s. 302 of the Indian Penal Code by U Kyaw U sitting as Special Judge in Rangoon Town. The order of the Acting Chief Justice confirmed the conviction and sentence.

The order in council (October 29, 1946) granting special leave to appeal restricted the appeal to the question of the jurisdiction of the Special Judge, who was appointed under the Special Judges Act (Burma Act X of 1943), enacted by the Governor of Burma in 1943 in purported exercise of the powers of the legislature of Burma which he had assumed to himself by a proclamation issued by him pursuant to s. 139 of the Government of Burma Act, 1935.

The appellant contended that the appointment by the Governor of Burma of a Special Judge to try criminal cases in Rangoon under the Special Judges Act was contrary to the proviso to sub-s. 1 of s. 139 of the Government of Burma Act, 1935, and that the Special Judges Act was ultra vires the Governor.

The terms of the proclamation and of the relevant statutory provisions appear from the judgment of the Judicial Committee.

1946. Dec. 19. *Casswell K.C.* and *Pennell* for the appellant. The jurisdiction and functions of, and the law administered by, the High Court at Rangoon were laid down in Letters Patent in 1922, and no Act or Order in Council has been passed since which has altered those functions or the jurisdiction of the judges. The Special Judges Act, 1943, was ultra vires the Governor of Burma in that by it he purported to supersede the High Court, and to abrogate or suspend their powers and

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functions without being empowered so to do by any Act or Order and in contravention of the prohibition contained in the proviso to sub-s. 1 of s. 139 of the Government of Burma Act, 1935. By the procedure adopted under the Special Judges Act the appellant was deprived of three things—the right to have the evidence taken in the first instance at a public inquiry on oath before a magistrate; trial by jury presided over by a judge of the High Court selected by the High Court; a right of appeal. It was not competent for the Governor to do this by the proclamation; he has constituted himself the legislature and purported by a legislative Act of himself alone to do exactly what the Government of Burma Act, 1935, says he may not do. Under the Act of 1935 the Governor was never allowed to appoint judges, except in case of vacancies to fill gaps, and he has now purported by an Act of legislature to appoint judges who were not contemplated at all by the Act of 1935, and so to alter the procedure of the criminal courts of Burma that he has taken away the above three great privileges from Burmese subjects. Admittedly, for certain purposes he could constitute himself the legislature, but this was the one point on which he must not so constitute himself; in the proviso to sub-s. 1 of the very section which gives him power to make a proclamation, s. 139, it is clearly said that he must not “assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, either in whole or in part, the operation of any provisions of this Act relating to the High Court.” As to this, the Act of 1935 has given the High Court exclusive jurisdiction, and this Special Judges Act has taken the exclusive jurisdiction away from it.

Sir David Maxwell Fyfe K.C. and D. A. Grant for the Crown. The appellant contends that by appointing a Special Judge to try criminal cases in Rangoon the Governor usurped the original criminal jurisdiction of the High Court, since that court had the exclusive right and duty of trying persons accused of serious crimes. The appellant referred to s. 84 of the Government of Burma Act, 1935, which provides that “the jurisdiction of . . . the High Court . . . shall be the same as immediately before the commencement of this Act.” It is admitted that immediately before the commencement of the 1935 Act the High Court at Rangoon had jurisdiction to try persons for crimes committed in Rangoon, but it is not admitted that such jurisdiction amounted to an exclusive right or duty. By appointing a Special Judge under the provisions

of the Special Judges Act the Governor did not assume to himself any of the powers vested in or exercisable by the High Court, contrary to the proviso to sub-s. 1 of s. 139 of the 1935 Act. The limitation in that proviso only strikes at the executive acts made by the proclamation. The proviso does not seek to limit, and is obviously not drawn so as to limit, legislative power at all. The operation of the provision in s. 84 of the Act of 1935 that the jurisdiction of the High Court should be the same as at the commencement of the Act, was not suspended by the Special Judges Act. Owing to the occupation of Burma by the Japanese its operation was already suspended. Next, the Special Judges Act did not alter the original criminal jurisdiction of the High Court; under the Act temporary courts were set up, but there was nothing in the Act which prevented the High Court, when re-established in Rangoon, assuming its original criminal jurisdiction. Further, if the jurisdiction of the High Court was altered by the Special Judges Act, the Governor having assumed to himself by proclamation the powers of the legislature to make laws, had power by such laws to alter the jurisdiction. The provisions of s. 84 of the 1935 Act are expressly stated to be "subject to the provisions of any Act of the legislature." The Special Judges Act was an Act of the legislature.

Casswell K.C. replied.

1946. Dec. 19. LORD WRIGHT announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed, and that they would give their reasons later.

1947. Feb. 17. The reasons for their Lordships' report were delivered by LORD WRIGHT. This is an appeal from the judgment of Dunkley A.C.J. of the High Court of Rangoon, dated March 26, 1946, in which he reviewed and confirmed a judgment given on February 25, 1946, by U. Kyaw U, a Special Judge appointed under the Special Judges Act, 1943 (Burma Act No. X of 1943) for Rangoon Town District. The said Special Judge had convicted the appellant under s. 302 of the Indian Penal Code and sentenced him to death. This sentence was confirmed by the High Court. The appellant petitioned His Majesty in Council for special leave to appeal both on the merits and on the question of the jurisdiction of the Special Judge. His submission on the latter point was

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that the Special Judge had no jurisdiction to try him and that the whole of the proceedings in his trial were illegal and void. Special leave to appeal was granted by Order in Council dated October 29, 1946, solely on the question of the jurisdiction of the Special Judge.

The Special Judges Act (Burma Act No. X of 1943) was an emergency and temporary Act enacted by the Governor of Burma at a time when the Japanese forces had occupied and taken military control of Burma, including Rangoon. The Act was in fact promulgated in Simla, to which place the Governor and the Government of Burma had retired during the hostile occupation. The preamble to the Act may usefully here be quoted : " Whereas it is expedient to provide for the " appointment of Special Judges for the trial of offences during " the present emergency, and to define their jurisdiction and " powers ; And whereas by Proclamation dated the tenth day " of December, 1942, the Governor of Burma has assumed to " himself all powers vested by or under the Government of " Burma Act, 1935, in the Legislature or in either Chamber " thereof."

The Act gave the Governor power to appoint in any area which the Act extends a Special Judge for the trial of accused persons under the Act. It defined, among other things, the requisite qualifications which a Special Judge had to possess. The Special Judge was empowered to try any offence punishable under any law for the time being in force and to pass any sentence authorized by law, and to take cognizance of offences without the accused having been committed for trial. The Special Judge was given wide discretion as to the conduct of the trial. There was to be no appeal by a convicted person and no application for revision was to be entertained by any court. The only provision for any revision was in the case of a death sentence, which was to be submitted for review by a judge of the High Court nominated by the Governor. That judge's decision was to be final. There were other provisions of the Act departing from the procedure prescribed by the Code, but subject to all these provisions, the Code and any other law for the time being in force, so far as applicable, were to apply to the trials before a Special Judge appointed under the Act. Legal proceedings in respect of anything done, or intended to be done, in good faith under the Act were barred. It was under this Act that the judge who tried the appellant was appointed, and under

this Act that all the proceedings took place. The Act had been duly notified, so that according to its tenor it came into force in Rangoon and was in force at the material time, having been duly extended from time to time by resolutions of both Houses of Parliament. The appellant, however, claimed that the Special Judges Act was wholly illegal and void and accordingly that his conviction and sentence should be set aside as having been *coram non judice*. To examine this contention it will be necessary to refer as briefly as possible to the legal position of the courts in Burma.

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The Government of Burma Act (26 Geo. 5, c. 3) was passed by Parliament in 1935, to give effect to the separation of Burma from India and to define the constitution of Burma. Part II of the Act vested the executive powers in the Governor. Parts III and IV dealt with the legislature, and it may be noted that certain sections (41 to 43) gave to the Governor particular powers to promulgate ordinances or enact laws under his discretionary powers and subject to the prescribed conditions. Section 34, however, saved the powers of Parliament to legislate for Burma, and also provided that except as expressly permitted by this Act, the legislature should not be empowered to make any law amending the Act or any order in council made under it, or any rules made under it by the Secretary of State, or by the Governor in his discretion. Part VIII of the Act dealt with the High Court of Rangoon, called the High Court, which was to consist of a Chief Justice and such number of other judges as His Majesty might deem necessary to appoint by warrant under the Sign Manual. Section 84 has been much referred to in argument and may be quoted in full: "84. Subject to the provisions of this Act, to " the provisions of any Order in Council made under this or " any other Act and to the provisions of any Act of the " Legislature, the jurisdiction of, and the law administered in, " the High Court and the respective powers of the judges thereof " in relation to the administration of justice in the court, " including any power to make rules of court, and to regulate " the sittings of the court and of members thereof sitting alone " or in division courts, shall be the same as immediately before " the commencement of this Act." This section in terms provided for the continuance of the legal system existing at the commencement of the Act, but the whole section was subject (*inter alia*) to the provisions of any Act of the legislature.

Part XII (s. 139) is of first importance for the decision of

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this appeal. It contains what are described as provisions in event of failure of constitutional machinery : “ 139.—(1) If at
 “ any time the Governor is satisfied that a situation has arisen
 “ in which the government of Burma cannot be carried on in
 “ accordance with the provisions of this Act, he may by
 “ Proclamation—

“ (a) declare that his functions shall, to such extent as may
 “ be specified in the Proclamation, be exercised by him in his
 “ discretion ;

“ (b) assume to himself all or any of the powers vested in or
 “ exercisable by any body or authority in Burma ;

“ and any such Proclamation may contain such incidental
 “ and consequential provisions as may appear to him to be
 “ necessary or desirable to give effect to the objects of the
 “ Proclamation, including provisions for suspending in whole
 “ or in part the operation of any provisions of this Act relating
 “ to any body or authority in Burma :

“ Provided that nothing in this sub-section shall authorize
 “ the Governor to assume to himself any of the powers vested
 “ in or exercisable by the High Court, or to suspend, either
 “ in whole or in part, the operation of any provisions of this
 “ Act relating to the High Court . . . ”

The remainder of the section contains certain requirements necessary for the continuance in force of such a proclamation, in particular, a resolution of both Houses of Parliament. Special attention, however, should be drawn to sub-s. 4 of the section, which is in the following terms : “ (4) If the
 “ Governor, by a Proclamation under this section, assumes to
 “ himself any power of the Legislature to make laws, any
 “ law made by him in the exercise of that power shall, subject
 “ to the terms thereof, continue to have effect until two years
 “ have elapsed from the date on which the Proclamation
 “ ceases to have effect, unless sooner repealed or re-enacted by
 “ Act of the Legislature, and any reference in this Act to
 “ Acts of the Legislature shall be construed as including
 “ a reference to such a law.”

The conditions were satisfied. It is now necessary to set out the effect of the proclamation issued at Simla on December 10, 1942, by the Governor of Burma. It was not contended by the appellant that the proclamation was ultra vires. It begins by reciting that the Governor of Burma is satisfied that a situation has arisen in which the Government of Burma cannot be carried on in accordance with the

provisions of the Government of Burma Act, 1935. As no suggestion is made that the Governor acts otherwise than in good faith, this declaration cannot be challenged, as the House of Lords held in *Liversidge v. Sir John Anderson* (1). The Governor then goes on to declare as follows: "Now therefore, in the exercise of the powers conferred by s. 139 of the Act, the Governor by this Proclamation

" (a) declares that notwithstanding anything to the contrary in the Act all his functions under the Act shall be exercised by him in his discretion ;

" (b) assumes to himself all powers vested by or under the Act in the Legislature of Burma and all powers vested in either Chamber of the Legislature, but not so as to affect any power exercisable by His Majesty with respect to Bills reserved for the signification of His Majesty's pleasure or the disallowance of Acts :

" (2) in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared either that he assents thereto in His Majesty's name or that he reserves it for the signification of His Majesty's pleasure ; "

Their Lordships have omitted the reference to incidental or consequential provisions which deal with executive matters which, in their Lordships' opinion, are not material here. What is material is that the Governor assumes all legislative powers vested in the legislature. In this capacity he enacted the Special Judges Act, which in all the circumstances has the force and validity of an Act of the legislature, and is part of the law of Burma at every material time. It is clear that the Special Judges Act has altered the jurisdiction of, and the law administered in, the High Court in several material aspects as compared with the position described in s. 84 of the Act of 1935, but s. 84, as already stated, was subject to the provisions of any Act of the legislature. It is in their Lordships' judgment clear that by the emergency powers given to the Governor by s. 139 of the Act of 1935, and in virtue of the proclamation whereby he has (inter alia) assumed to himself the powers vested in the legislature under the Government of Burma Act, he can validly and legally change the pre-existing system of jurisdiction at least to the extent which he has done in the

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Special Judges Act. Under the emergency powers of legislation he could validly make the same sort of changes which the legislature could have made, so far as is relevant for the purposes of this case. The Special Judges Act is in truth an Act of the legislature.

The appellant has sought to show that the Special Judges Act was incompetent on various grounds. That the Act altered the law cannot be questioned. The accused was under the Act deprived of the right to have the evidence taken at a public inquiry on oath before a magistrate, of a trial by jury presided over by a judge of the High Court selected by the High Court, and of a right of appeal. But any one of these infringements of the subject's rights may have happened in war-time to any subject of any of the allies, and may be justifiable in law as an emergency or temporary measure. The main specific objection taken on behalf of the appellant is that the Governor has infringed the provisions of the proviso to s. 139, sub-s. 1, of the Government of Burma Act by assuming to himself powers vested in or exercisable by the High Court, or has suspended the operation of the provisions of the Act in relation to the High Court. This, in their Lordships' judgment, involves a misconception. The Governor did not interfere with the High Court or its jurisdiction. There was nothing to give exclusive jurisdiction to the High Court. Indeed, if that is material, the High Court was not able to exercise its jurisdiction; it was not functioning. But in any case there was no law to prohibit the legislative authority in Burma from establishing a new or collateral court. It is obviously a fallacy to say that by establishing a new court the Governor was assuming to himself the powers vested in the High Court. He was not making himself the judge and he was entitled to vest the right to appoint the judges of the new court, as he did under the Special Judges Act. Nor was he altering the jurisdiction of the High Court by establishing a new court with its own jurisdiction. All the objections taken by the appellant fail in their Lordships' judgment. They are of opinion that the Special Judges Act was valid and authorized what was done under it.

Such are the reasons for the advice humbly given to His Majesty that the appeal should be dismissed.

Solicitors for appellant : *Lambert & White.*

Solicitor for respondent : *The Solicitor, India Office.*

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2 All E.R. 868.

Applied. WELCH v.
NAGY [1950] 1 K. B. 455

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[HOUSE OF LORDS]

**J. & F. STONE LIGHTING AND RADIO
LIMITED**

APPELLANTS

AND

LEVITT RESPONDENT.

H. L. (E.)*

1946

Oct. 15, 16,

17:

Nov. 22.

Landlord and tenant—Rent restriction—Rent less than two-thirds of rateable value—Judgment on basis that that was standard rent—Subsequent claim for possession on ground that Acts did not apply—Res judicata—Statutory provision—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 7.

By s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "Where the rent payable in respect of
"any tenancy of any dwelling-house is less than two-thirds of the
"rateable value thereof, this Act shall not apply to that rent or
"tenancy nor to any mortgage by the landlord from whom the
"tenancy is held of his interest in the dwelling-house and this Act
"shall apply in respect of such dwelling-house as if no such tenancy
"existed or ever had existed."

In 1937 the respondent, being employed by the appellants as manager of a shop belonging to them, was allowed to occupy a flat above it "in consequence of that employment" within sch. I., para. (g) (i.) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, paying a rent of 10s. a week. His employment ceased in March, 1943, but he continued to occupy the flat paying a rent of 1*l.* a week from April, 1943. In October, 1944, the appellants, wishing to instal a new manager in the flat, served on the respondent a notice to quit, and subsequently brought an action in the county court to recover possession, relying on sch. I., para. (g) (i.) to the Act of 1933, and alleging that the rent was 1*l.* a week. The respondent denied that the rent was 1*l.* a week and made a counterclaim for the return of overpayments, on the basis that "the proper and lawful rent" was 10s. a week. The judge held that a new tenancy was created in April, 1943, that this letting was not in consequence of the respondent's employment and that, as sch. I, para. (g) (i) did not apply, there was no jurisdiction to make an order for possession. On the counterclaim he gave judgment for repayment of 35*l.* 10s., on the basis that the standard rent was 10s. a week. The appellants, having satisfied the judgment and accepted two weeks' rent at 10s. a week, again gave the respondent notice to quit and, in a subsequent action, claimed possession on the ground that the rent at the rate of 10s. a week was less than two-thirds of the rateable value of the premises, which was 42*l.* a year:—

Held that, although the judgment on the counterclaim in the first action was bad in law for want of jurisdiction, by reason of s. 12,

* *Present:* LORD THANKERTON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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sub-s. 7, of the Act of 1920, the parties had by their actions agreed that the rent payable was 10s. a week at the material date, i.e., the date at which s. 12, sub-s. 7, was sought to be applied. Accordingly, the tenancy was not protected under the Rent Restriction Acts and neither estoppel nor *res judicata* gave the court jurisdiction under those Acts.

Decision of the Court of Appeal [1945] W. N. 154 ; 173 L. T. 174, reversed.

APPEAL from the Court of Appeal (MacKinnon and du Parc L.JJ. and Stable J.).

The facts, stated by Lord Thankerton and Lord Porter, were as follows: In 1937, the respondent was engaged by the appellants as manager of one of the shops which they owned and was given occupation of a flat above it, consisting of three rooms with kitchen, bathroom and lavatory, at a rent of 10s. a week, which brought the tenancy within sch. I, para. (g) (i) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as a tenancy "in consequence of that employment." Although he ceased to be in their employment in March, 1943, he continued to occupy the flat but, by agreement, he paid an increased rent of 1*l.* a week as from April 7, 1943. On October 21 1944, the appellants, having engaged a new manager whom they desired to instal in the flat, served notice to quit on the respondent and, on his failure to quit, they brought an action for possession in the Epsom county court. The particulars of claim stated (*inter alia*) that the respondent was tenant of the flat at a rent of 1*l.* a week. The respondent in his defence admitted the tenancy but denied that the rent was 1*l.* a week and made a counterclaim alleging that "the proper and "lawful rent" was 10s. a week and on that basis claiming a refund of the over-payments from April, 1943, to December 5, 1944. It was mentioned in the evidence that the rateable value of the flat was 42*l.* The appellants based their claim on sch. I, para. (g) (i), to the Act of 1933. At the hearing the appellants' counsel agreed that the standard rent was 10s. a week. The judge gave judgment on January 10, 1945, holding that a fresh tenancy agreement at a rent of 1*l.* a week was entered into in April, 1943, the respondent having ceased to be in the appellants' employment, and that, accordingly, there was no jurisdiction to make an order for possession as sch. I, para. (g) (i), did not apply; the claim, therefore, failed. On the counterclaim the judge held that the principle in *Read v. Gordon* (1) applied and gave judgment for repayment

(1) [1941] 1 K. B. 495.

of 35*l.* 10*s.* The appellants did not appeal against this decision but, in compliance with it, satisfied the judgment, paying the sum ordered, which was accepted by the respondent, who also thereafter paid two weeks' rent at 10*s.* a week, this being accepted by the appellants. On January 18, 1945, the appellants gave the respondent notice to quit the flat on January 29, 1945, and, the respondent having failed to comply with the notice, they brought a second action on February 21, 1945, in the Epsom county court, to recover possession. The particulars of claim stated that the respondent was tenant at a rent of 10*s.* a week and that the ground of the claim was "that the said rent of 10*s.* per week is less than two-thirds of the net assessment of 42*l.* per annum of the said premises." It was not disputed that this was the rateable value. The judge held that in the circumstances the question whether the tenancy was protected by the Rent Restriction Acts was *res judicata*, as a result of his previous decision on the counterclaim and refused an order for possession. The Court of Appeal, upheld this decision on a different ground, holding that the standard rent was not 10*s.* a week, that the rent had never been agreed between the parties and that the premises and the tenant were still protected; it followed that, though they were of opinion that the matter was not *res judicata* nor were the landlords estopped from saying that the tenancy was unprotected, yet they were prohibited by s. 3 of the Act of 1933 from making an order for possession. The judgment ended with the words (1): "We are thus bound to decide the case according to the facts, and we are clearly of opinion that the only reason given by the plaintiffs for their claim to possession was a bad reason, based on a fundamental error of law, and that they have made out no claim to possession." The appellants appealed to the House of Lords.

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Charles Henderson K.C. and *Gorst* for the appellants. There should be an order for possession under sch. I (g) (i), to the Act of 1933 because the letting to the respondent was all the time a letting in respect of his employment and there was no new contractual tenancy in April, 1943, making him a statutory tenant, and because the appellants require the flat for their new manager: see *Morrison v. Jacobs* (2) and *Benninga (Mitcham), Ltd. v. Bijstra* (3). The judge was wrong in holding that *Read*

(1) [1945] 173 L. T. 174, 176.

(3) [1946] K. B. 58.

(2) [1945] K. B. 577.

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v. *Gordon* (1) applied. That decision was the high water mark of the authorities dealing with the creation of a new tenancy and the court will not extend the scope of its applicability. Further, the actual rent of the flat at all material dates was not 1*l.* a week but 10*s.* a week, i.e., less than two-thirds of the rateable value and so, by s. 12, sub-s. 7, of the Act of 1920, these Acts do not apply to the tenancy. The actual rent for this purpose must be the legally exigible rent. In any given case the rent payable is the sum agreed between the parties not in excess of the standard rent. The "rent payable" for the purposes of s. 12, sub-s. 7, is different from the "standard rent" under s. 12, sub-s. 1 (a). The two sub-sections are dealing with different things. The Court of Appeal did not properly consider what was the crucial date for the ascertainment of the rent payable in respect of this tenancy: it is the time at which the sub-section is sought to be applied: see *Gidden v. Mills* (2). Accordingly, whether this be regarded as a statutory tenancy or a common law tenancy, the appellants were entitled to possession. The respondent has not established any bar to the applicability of s. 12, sub-s. 7. The main question involved in this appeal is as follows: Where, in the suit of a statutory tenant, a final judgment, erroneous in point of law, is obtained in the tenant's favour, securing for him a reduction of rent so that his tenancy is thereby removed from the control afforded by the provisions of the Rent Restriction Acts, can he thereafter, in different proceedings between the same parties in respect of a later rent period, whilst that judgment stands, and, notwithstanding that he has taken advantage of its benefits, disavow it; and must the court disregard it because of the provisions of s. 3 of the Act of 1933? The answer in this case is that the judgment in the first action is final and binding between the parties in respect of the matters in the counterclaim thereby determined, viz., the determination by the court (a) in the exercise of its powers conferred by s. 11, sub-s. 1, of the Act of 1923 and s. 6 of the Act of 1933, that the legally exigible rent between April, 1943, and December 5, 1944, was 10*s.* a week, and (b) in the exercise of its powers conferred by s. 14 of the Act of 1920, that the sum of 35*l.* 10*s.* in excess of the rent of 10*s.* a week had been paid to the appellants by the respondent during that period and was recoverable from them. Thus it is not open to the respondent to contend that the rent was other than 10*s.* a week as now agreed between the parties

(1) [1941] 1 K. B. 495.

(2) [1925] 2 K. B. 713.

by their actions. The doctrine of *res judicata* or estoppel applies to the matters determined in the first action and none of them overrides or defeats any statutory prohibition or direction in s. 3 of the Act of 1933 or in any of the other Acts. *Griffiths v. Davies* (1) does not prevent the doctrine being applied against the respondent on the facts of this case. See also *Hoystead v. Commissioner of Taxation* (2) and *Cooke v. Rickman* (3). [They also referred to *Veale v. Cabezas* (4).]

Beyfus K.C. and *Weitzman* for the respondent. Till the end of October, 1944, the respondent was an ordinary contractual tenant at 1*l.* a week. That tenancy was terminated by the first notice to quit and since then there has been no fresh letting to him. The contractual tenancy ended and as a statutory tenant he held on the same terms as previously, paying a rent of 1*l.* a week : see s. 15 of the Act of 1920. This was the standard rent, since the date which must be considered in fixing the standard rent is the date of the letting : see s. 12, sub-s. 1. On a proper consideration of the facts the rent of 1*l.* a week was the first rent to which the Rent Restriction Acts applied and the rent of 10*s.* a week must be entirely disregarded. The first date at which this flat was let, so far as the Acts were concerned, was April, 1943. In view of s. 12, sub-s. 7, of the Act of 1920, the standard rent could not be 10*s.* a week and is inconsistent with the judge's decision that this is a protected tenancy and that the respondent was a statutory tenant. It was the respondent's inconsistent counterclaim which caused the difficulty, producing a misconception shared in by the judge and both the counsel. But the judge having jurisdiction under the Acts could not make an order the effect of which was to undermine his own jurisdiction by putting the premises outside the Acts : see *Bradshaw v. M'Mullan* (5). If the respondent was not a statutory tenant he was a trespasser and he could not be entitled to any such refund in respect of overpayments of rent as was ordered on the counterclaim, since the judge could only order repayment under the Acts of sums paid in excess of the standard rent. The parties did not agree as landlord and tenant that the rent was 10*s.* a week : they merely formed an erroneous opinion in law that the standard rent was 10*s.* a week and such a mistaken belief would not take the tenancy out of the Acts, as would an agreement to pay less than two-thirds of the rateable value : see *Griffiths v. Davies* (1). If the tenant

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(4) [1921] W. N. 311.

(2) [1926] A. C. 155, 165.

(5) [1920] 2 I. R. 412, 425.

(3) [1911] 2 K. B. 1125.

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submits to the judgment of the court, this cannot affect his rights in the future in relation to an Act of Parliament which lays down the rights of the parties: see *Bradshaw v. M'Mullan* (1). That was substantially the situation in the present case. The appellants are seeking to obtain possession through an error of the judge and if the House were to allow the appeal it would, in effect, be saying that because the judge held that the rent was 10s. a week (which it was not) he thereby gave himself a jurisdiction to make a possession order (which he had not got). No estoppel, such as is relied on by the appellants, was created by the finding of the judge. If there was an estoppel it must have extended also to the decision that the tenancy was within the Rent Restriction Acts. If the appeal is allowed the House should remit the case to the county court with a direction to incorporate in its order some provision for giving the respondent reasonable time to remove. Further, the difficulty has arisen through the joint mistake of the parties in the original action and the order as to costs should take account of this.

Weitzman following. The House should deal with this matter on the state of facts existing at the date of the second trial. The respondent became a statutory tenant at a rent of 17. a week and no agreement on his part to occupy the premises on any other conditions can be inferred. In the county court the appellants did not contend that a contractual tenancy could be inferred and, accordingly, they cannot raise the point now: see *Smith v. Baker* (2).

Charles Henderson K.C. in reply. *Bradshaw v. M'Mullan* (3) is not relevant because in that case there could be no contracting out of the matter provided for. *Griffiths v. Davies* (4) is not against the appellant, for there the tenant was paying too much rent and not too little. Nothing in any of the decided cases is against their proposition. The crucial question is: What was actually the agreed rent at the material date for the purposes of s. 12, sub-s. 7? What the parties thought makes no difference and it does not matter what the respondent thought was the standard rent. In all the circumstances the appellants should be awarded costs.

THE HOUSE took time for consideration.

Nov. 22. LORD THANKERTON. My Lords, the appellants

(1) [1920] 2 I. R. 412, 415.

(3) [1920] 2 I. R. 412.

(2) [1891] A. C. 325.

(4) [1943] K. B. 618.

are owners of a shop, and of a flat above it, consisting of three rooms, with kitchen, bathroom and lavatory. The respondent is in occupation of the flat. On January 18, 1945, the appellants served on the respondent notice to quit on January 29, 1945, and the respondent having failed to comply with the notice, the appellants brought the present action on February 21, 1945, to recover possession. In the particulars of claim it was stated that the respondent was tenant at a rent of 10s. per week, and the ground of the claim for possession was that the rent was less than two-thirds of the net assessment of 42*l.* per annum.

This claim was based on sub-s. 7 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides as follows: [His Lordship read the sub-section and continued:] The application of this section depends on the ascertainment of two facts, namely, first, the rateable value of the dwelling-house as defined by sub-s. 1 (*e*) of s. 12, and, secondly, the rent payable in respect of the tenancy.

It is agreed that the rateable value of the premises here in question was 42*l.* As regards the rent payable, I am clearly of opinion that the point of time at which it falls to be determined is when sub-s. 7 is sought to be applied, and it matters not in the present case whether the relevant date is when the notice to quit is served or when it expires. It is also clear, in my opinion, that an earlier fixing of a standard rent, and the fact of the tenant having been previously a statutory tenant, are irrelevant to the present purpose, except in so far as these earlier facts may be of assistance in ascertaining the rent payable at the relevant date. The very purpose of the inquiry is to settle whether the Rent Restriction Acts apply at all to the existing tenancy, and equally whether the tenant is a statutory tenant with rights in regard to a standard rent and otherwise.

It will therefore be convenient to consider the earlier relations between the parties, in order to see how far they can throw light on the position at the relevant date. [His Lordship stated the facts, and continued:] From the above facts it appears clear to me that, however bad in law the judgment on the counter-claim may now be demonstrated to be, on the ground that it was without jurisdiction in view of sub-s. 7 of s. 12 of the Act of 1920, the fact remains that the parties, by their actions, were agreed that the rent payable in respect of the tenancy at the material date was 10s. per week. Having reached this con-

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clusion in fact, it is idle to suggest that either estoppel or res judicata can give the court a jurisdiction under the Rent Restriction Acts, which the statute says it is not to have. I agree with the comments of Lord Greene M.R. in *Griffiths v. Davies* (1). With all respect to the opinion of du Parc L.J., I am of opinion that, looking at the facts at the relevant date, untrammelled by the previous decision, the rent of 10s. was agreed on by both parties at that date. Accordingly, I am of opinion that the respondent's tenancy is not protected under the Rent Restriction Acts, and that the order appealed against should be reversed, and the case remanded to the Epsom county court, with a direction that the respondent should be ordered to deliver up possession of the premises to the appellants within a period of six weeks from the date of such order. The respondent should pay the appellants' costs in the action, including the costs of this appeal.

My Lords, I am asked by my noble and learned friend LORD MACMILLAN to say that he concurs in that opinion.

LORD PORTER. My Lords, the facts in this case have been fully stated and it is only necessary to consider their legal result. Admittedly the house, possession of which is sought to be recovered, is subject to the provisions of the Rent Restriction Acts. It is accepted by both parties that a new tenancy began in October, 1944, and that the rent then chargeable, which was 20s. a week, was that at which it was first let after September 1, 1939, unless 10s. be regarded as the rent at which it was first so let. In the former case the standard rent would be 17s. a week under the terms of s. 12, sub-s. 1 (a), of the Act of 1920, and in the latter it would be 16s. 2d. under the proviso to that sub-section. In either case the premises would be subject to the Act and the landlord could not increase the rent beyond those rates to anyone whether a sitting or future tenant. But though the house was a protected house it does not follow that the particular tenancy is a protected tenancy. Under the terms of s. 12, sub-s. 7, of the Act of 1920: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." It is common ground that if the rent at the material time was less than two-thirds of the rateable value then the respondent's tenancy was

(1) [1943] K. B. 618, 620-1.

unprotected and he enjoyed not a statutory but only a common law right. The questions therefore which your Lordships have to determine are what was the material time and what was the rent at that time. The fixing of the material time does not give rise to any difficulty: at earliest it was the date on which notice to quit was given, i.e., on January 18, 1945, at latest it was the date of the learned county court judge's decision on March 28 of that year. At either of these dates and at any date in between them the learned county court judge had given his decision in the earlier action and, whichever date be taken, no difference in principle affects the conclusion to which your Lordships should come.

My Lords, undoubtedly the learned county court judge was wrong in deciding that the landlord must repay 35*l.* 10*s.* and inferentially that 10*s.* a week was the standard rent. He had, however, jurisdiction under s. 3 of the Act of 1933 to determine what the rent, the standard rent and the net rent were, and he did in fact decide that the rent was 10*s.* a week though he did so under the mistaken impression, induced by the agreement of the parties, that that was the standard rent. Not only did he so decide, but the claim was made by the tenant that the proper and lawful rent was 10*s.* a week, the landlord agreed and the tenant both accepted a repayment on that basis and for two further weeks after the judgment paid rent at that figure. Until after the decision in the Court of Appeal that position was never controverted and I cannot think that the letter which the tenant's representative then wrote, can alter the position. In the face of the county court judge's decision and its acceptance by the parties, in my view the rent at all material times was 10*s.* a week. It was said, however, on behalf of the respondent that when he ceased to be employed by the appellants and occupied the premises at a rent of 1*l.* a week he became a statutory tenant and that no agreement on his part to occupy on any other conditions could be inferred. An agreement, it was conceded, to pay less than two-thirds of the rateable value would take him out of the Act, but not such a payment under the mistaken belief that he owed no more. For this proposition *Griffiths v. Davies* (1) was cited. In that case however the tenant was always protected by the Act—he paid too much and not too little. Under the Acts a tenant cannot be liable to pay more than the standard rent, but there is nothing to prevent his paying less. Here as I have said he

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claimed, accepted, and paid, 10s. a week and no more and obtained a judgment with that result. The landlord could have recovered no more so long as that judgment stood. It was in force until long after notice to quit was given. In my view during the material period 10s. a week was and remained the rent. Nor does it make any difference that the decision, or its acceptance, was based on a mistaken view of the law. The question is not whether the unappealed decision was right, but what it was. It decided what the rent was at the material time. Whether in the county court there would have been jurisdiction to determine the true standard rent on a fresh application before notice to quit was given does not here come in question. No such application was made. Until after the decision in the Court of Appeal 10s. a week was the rent : it is less than two-thirds of the rateable value and this tenancy is not, though the premises are protected. I would allow the appeal.

LORD SIMONDS. My Lords, I concur.

LORD UTHWATT. My Lords, the effect of sub-s. 7 of s. 12 of the Act of 1920 is that if and so long as " the rent payable " in respect of any tenancy of a dwelling-house is less than two-thirds of its rateable value, the Act does not apply to that rent or to that tenancy. The phrase " the rent payable " clearly means the rent which the landlord is entitled to demand and the tenant bound to pay. The point to be determined is whether the landlord is right in his assertion that the rent payable at the critical date was 10s. a week—a sum which comes out at less than two-thirds of the rateable value. There was no change in the state of affairs between the date of the service of the notice to quit and the date of the expiry of that notice, and it is unnecessary therefore to consider which of these two dates is for the purpose of this section the critical date.

In the normal case there is no difficulty in ascertaining the rent payable as respects any dwelling-house to which the Act applies. If the tenancy of such a dwelling-house is not one to which the Act applies, the agreement of the parties concludes the matter. If the tenancy is one to which the Act applies, then the rent payable—both during the agreed term and any retention after the determination of that term (see s. 15 of the Act of 1920)—is the agreed rent subject to the statutory maximum. The standard rent plus the permitted increases is not automatically the rent in the case of any dwelling-house

whatever be the nature of the tenancy. The standard rent attaches to the house, not to the tenancy.

In the case before the House the parties did not after the first proceedings in the county court direct their attention to the making of any new agreement as to the amount of the rent payable. But both accepted the position that the exigible rent was 10s. a week and rent was paid and accepted on that basis. That sum represented their common intention as to the rent and neither party could assert that any other sum came into the picture as the rent payable down to the date of the expiration of the notice to quit. A new position had been created by the actings of the parties. Once the common intention is apparent, the peculiar circumstances that led to that intention become irrelevant. The facts are undisputed. The proper inference of law from those facts is, in my opinion, that at the critical date the rent payable was 10s. a week. I would allow the appeal.

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Appeal allowed.

Solicitors for appellants : *Moreton Phillips & Son.*

Solicitor for respondent : *Sidney Samson.*

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v. GOOD
[1951] 1 K. B. 517

Dictum of LORD PORTER, at p. 224,
applied. MINT v. GOOD. [1950] 2 All
E.R. 1159.

[HOUSE OF LORDS]

MCCARRICK APPELLANT ; H. L. (E.)*

AND

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Oct. 17, 18 ;
Nov. 22.

Landlord and tenant—Dwelling-house—Want of repair—No express notice—Landlord's obligation—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 2.

By s. 2 of the Housing Act, 1936 : “ (1.) In any contract for
“ letting for human habitation a house at a rent not exceeding
“ (a) in the case of a house situate in the administrative county
“ of London, forty pounds ; (b) in the case of a house situate
“ elsewhere, twenty-six pounds ; there shall, notwithstanding
“ any stipulation to the contrary, be implied a condition that the
“ house is at the commencement of the tenancy, and an under-
“ taking that the house will be kept by the landlord during the
“ tenancy, in all respects reasonably fit for human habitation

* *Present* : LORD THANKERTON, LORD MACMILLAN, LORD PORTER,
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" . . . (2.) The landlord, or any person authorized by him in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof."

The undertaking implied by the section that a dwelling-house will be kept in all respects reasonably fit for human habitation is subject to an implied term that the obligation on the landlord to repair any defect does not arise until he has notice of it.

Morgan v. Liverpool Corporation [1927] 2 K. B. 131, approved.
Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., du Parc and Morton L.JJ.).

The appellant was at all material times the tenant of a dwelling-house, No. 6, Brown Street, in the city of Liverpool of which the respondents were landlords. The rent was 7s. 6d. a week and accordingly the house was subject to the provisions of the Housing Act, 1936. By reason of the defective condition of two stone steps leading from the kitchen to the back kitchen the house was not "reasonably fit for human habitation." In consequence of this defect the appellant's wife on June 9, 1943, fell and fractured her leg. The appellant brought an action for damages against the respondents in the Liverpool Court of Passage, the damages being agreed at 70*l.* The deputy presiding judge, having held that the house was not kept in the state required by s. 2 of the Act, nevertheless found as a fact that no notice of want of repair was received by the respondents. He accordingly dismissed the action. The Court of Appeal having affirmed this decision, the appellant appealed to the House of Lords.

Laski K.C. and *Pappworth* for the appellant. The Housing Act, 1936, does not contain any provision that notice should be given by the tenant to the landlord of the unfitness for human habitation of any house subject to the Act. No implication should be made that the landlord must receive notice of a defect before an obligation to remedy it arises. *Morgan v. Liverpool Corporation* (1) was wrongly decided. The Act must be read in the light of the earlier housing Acts. They are set out in the report of the appellant's argument in *Summers v. Salford Corporation* (2). The provisions particularly relevant to the present case are: the Artizans' and Labourers'

(1) [1927] 2 K. B. 131.

(2) [1943] A. C. 283, 285.

Dwellings Act, 1868, s. 12, which contains the first provision for inspection of the premises; the Housing of the Working Classes Act, 1890, s. 31, which contains a provision giving the landlord a right to inspect the premises, s. 75, which deals with the question of fitness for human habitation, and s. 79 which relates to the medical officer of health; the Housing, Town Planning, etc., Act, 1909, s. 14, which provides for fitness for human habitation, and s. 15, which provides for a right of inspection; the Housing Act, 1925, s. 1, sub-ss. 1 and 2 which contains similar provisions and, finally, s. 2 of the Act of 1936. The conclusion to be reached by an examination of this legislation is that the duty imposed on the landlord by s. 2 is one analogous to that imposed on a factory occupier by the Factory Acts and is absolute: see *Summers v. Salford Corporation* (1). The Act of 1936 culminates a long series of increasingly stringent statutes in favour of the labouring classes, so that the present position is that in the case of houses below a certain level of rental and normally occupied by the labouring classes, the landlord bears certain perils and liabilities, and, for the protection of the persons whom it meant to benefit, the legislature has imposed on him an absolute obligation. The effect of this legislation should not be minimized or neutralized by introducing notions inspired by the old law: see *Rose v. Ford* (2) and Halsbury's Laws of England (2nd ed.), vol. 31, p. 478. The relevant obligation, being statutory, should be construed without regard to the common law, in such a way as to remedy the mischief against which the Act was providing. The situation, in the case of such tenancies as this, should not be treated as similar to that, where the parties are negotiating at arm's length. Moreover, this Act and its predecessors give the landlord a right to enter the premises and view the state of repairs, and where such a right is expressed or implied, he is liable for any defects of repair, even though no notice of them may have been given him: see *Murphy v. Hurley* (3), Viner's Abridgment (2nd ed.), vol. 16, pp. 4-6, Nos. 8, 10, 12 and 19, and Prideaux's Precedents in Conveyancing (23rd ed.), vol. 2, pp. 120, 122 and 124. [They also referred to *Vyse v. Wakefield* (4); *Makin v. Watkinson* (5); *London & South Western Ry. Co. v. Flower* (6); *Manchester Bonded Warehouse Co., Ltd.*

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(1) [1943] A. C. 283.

(4) (1840) 6 M. & W. 442, 452.

(2) [1937] A. C. 826, 846.

(5) (1870) L. R. 6 Ex. 25.

(3) [1922] 1 A. C. 369, 374, 375.

(6) (1875) 1 C. P. D. 77, 82, 87.

H. L. (E.) v. *Carr* (1) ; *Hugall v. M'Lean* (2) ; *Tredway v. Machin* (3) ;
 1946 *Torrens v. Walker* (4) ; *Melles & Co. v. Holme* (5) and *Fisher v.*
 McCARRICK *Walters* (6).]

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Nelson K.C. and *Allister Hamilton* for the respondents.
 Notice to the respondents of the defective condition of the steps
 was a condition precedent to its liability. At common law in
 the case of an express covenant to repair, the landlord's
 liability to repair arises only on receipt of notice of the defect.
 There is no difference between such a covenant made inter partes
 and one implied by statute : see *Ryall v. Kidwell & Son* (7)
 and *Walker v. Hobbs & Co.* (8). The reasons for making
 notice by the tenant of the defective condition of the property
 a condition precedent to the landlord's liability in the general
 law applies with at least equal force in the case of a tenancy
 under the Act of 1936. The basis of the common law rule is
 that there is knowledge on one side and not on the other.
 That is the explanation of *Murphy v. Hurley* (9). In the case
 of large corporation estates, such as those of the respondents,
 the possibility of even weekly inspection is remote, where there
 are thousands of houses, a large proportion of them compulsorily
 acquired under clearance orders. One must interpret a statute,
 so as to incorporate it, if possible, in the common law and not
 to change the common law : see *Craies on Statute Law* (4th ed.),
 p. 171. *Morgan v. Liverpool Corporation* (10) was rightly
 decided. [They referred to *Hugall v. M'Lean* (2) ; *London &*
South Western Ry. Co. v. Flower (11) ; *Torrens v. Walker* (4) and
Bishop v. Consolidated London Properties, Ltd. (12).]

Laski K.C. in reply. The reason for giving the landlord a
 right of entry was that an obligation was imposed on him,
 whether he had notice of any defect or not. If he was not to
 be liable for defects of which he was unaware, he would never
 trouble to exercise his right of inspection. Further, the
 object of these Acts is that a certain standard of sanitation
 should prevail in the country generally. This would be defeated
 if a man who did not mind living in piggish conditions and gave
 his landlord no notice of them thus absolved him from liability.

THE HOUSE took time for consideration.

(1) (1880) 5 C. P. D. 507.

(2) (1885) 53 L. T. 94.

(3) (1904) 91 L. T. 310.

(4) [1906] 2 Ch. 166.

(5) [1918] 2 K. B. 100.

(6) [1926] 2 K. B. 315.

(7) [1914] 3 K. B. 135.

(8) (1889) 23 Q. B. D. 458.

(9) [1922] 1 A. C. 369.

(10) [1927] 2 K. B. 131.

(11) 1 C. P. D. 77.

(12) (1933) 102 L. J. (K. B.) 257.

LORD THANKERTON. My Lords, I have had the privilege of considering the opinion of my noble and learned friend Lord Simonds, and I agree with his reasoning and his conclusions. This case has provided the occasion for consideration of the decision of the Court of Appeal in *Morgan v. Liverpool Corporation* (1), as to which I reserved my opinion in *Summers v. Salford Corporation* (2), and such consideration has fully satisfied me that the decision in *Morgan v. Liverpool Corporation* (1) was right. The effect of s. 2, sub-s. 1, of the Housing Act, 1936, is to incorporate the prescribed condition in the contract for letting so that it becomes an integral part of the contract, the whole of which falls to be looked at for purposes of construction, and the statutory origin of such condition, once it has been inserted in the contract, does not differentiate it from any of the conventional stipulations in the contract in any question of construction. It follows that the implied condition as to notice of the material defect, established by the long line of authority referred to by my noble and learned friend, falls to be implied in the present case, and the appeal fails.

LORD PORTER. My Lords, this appeal is brought in order finally to determine a point which was decided in favour of a landlord and against a tenant in *Morgan v. Liverpool Corporation* (1), but was left open in your Lordships' House in *Summers v. Salford Corporation* (2). The question arises under s. 2 of the Housing Act, 1936, a section which repeats s. 1 of the Housing Act, 1925, and substantially re-enacts the provision of the Housing of the Working Classes Act, 1890, s. 75. The section in force at the material time was that contained in the latest Act and was as follows. [His Lordship, having read the section, continued :] My Lords, admittedly in the present case there was evidence on which the judge could find that the house was not kept in the state required and he has so found. Prima facie, therefore, the landlord has failed to perform the duty laid on him and is liable to the tenant unless there is some term implied in the agreement of tenancy which is not inconsistent with the statutory obligation and excuses him from such performance. The term which it is said must be read into the contract between landlord and tenant is that, though the landlord must indeed keep the premises in a proper state of repair, yet his obligation arises and he is guilty of a breach only if the tenant has given notice of the want of repair.

(1) [1927] 2 K. B. 131.

(2) [1943] A. C. 283.

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My Lords, in construing this statute its exact terms must be considered. It does not impose extraneously a duty upon the landlord, it merely inserts a term into the tenancy agreement, and this term then becomes part of the contract between the parties, whether they wish it or not. In such a tenancy there is no reason why any term should not be implied, provided it is necessary to secure the business efficacy of the contract and it is not contrary to the provisions of the Act. In determining this question one must treat the tenancy agreement as if the provision enjoined by the Act was inserted in it and consider whether an agreement in that form means that the landlord must keep the premises habitable though no notice has been given to him that they were or are not fit for human habitation. My Lords, I cannot see that the insertion of the words "provided he knows that the premises are not in habitable repair," or, if you please "provided that the tenant has given him notice of the want of repair," is contradictory of the wording of the section, though no doubt it limits its effect. But it still has to be determined whether their insertion is necessary to give business efficacy to the contract. I think it is. In an ordinary case where a landlord undertakes to repair the outside of the main structure of a house it is unusual to insert an express covenant entitling him to enter and do the repairs, though where the tenant undertakes to do some repairs or decoration, it is usual to insert a covenant permitting the landlord to enter and view in order to ascertain that the tenant has complied with his covenant. Nevertheless in the former case a right to enter and repair has, I think been implied, and the landlord's obligation has been held only to arise if he has knowledge or notice of the want of repair: see *Makin v. Watkinson* (1). The reasoning in that case was that it would be impossible for a landlord to carry out his obligations unless he could ascertain whether repairs were required and if they were could enter and do them. If cases under the Act are taken into consideration there are a number of decisions to the same effect. Amongst those quoted were: *London & South Western Ry. Co. v. Flower* (2), *Manchester Bonded Warehouse Co., Ltd. v. Carr* (3), *Hugall v. M'Lean* (4), *Tredway v. Machin* (5), *Torrens v. Walker* (6) and *Morgan v. Liverpool Corporation* (7).

(1) L. R. 6 Ex. 25.

(2) 1 C. P. D. 77.

(3) 5 C. P. D. 507.

(4) 53 L. T. 94.

(5) 91 L. T. 310.

(6) [1906] 2 Ch. 166.

(7) [1927] 2 K. B. 131.

In *Summer's* case (1), which was also referred to, the point did not arise since notice had in fact been given. My Lords, whatever view might have been taken of the section, if no previous history lay behind it, one has to remember that similar provisions in earlier Acts had been interpreted as only requiring the landlord to repair after notice and it is, in my view, too late to re-interpret its meaning. Perhaps the most forcible way of supporting the judgment of the Court of Appeal is to point out that *Morgan v. Liverpool Corporation* (2) was decided in 1927 and that the provisions of s. 2 were re-enacted in the same form in 1936. When considering this topic it is only necessary to add that no question of the latency of the defect comes in issue as it did in *Fisher v. Walters* (3). If it did the decision in that case would require to be carefully scrutinized. But it is said that though notice may have to be given by the tenant in certain cases, the class to which such an obligation applies is only that in which the landlord by his tenancy agreement has no right express or implied to enter and view the state of repairs. At any rate it is contended that the principle has no application to a case where there is an express term empowering the landlord to enter. In *Broggi v. Robins* (4), Lord Russell of Killowen C.J. decided that notice was necessary in order to saddle the landlord with liability, but that was a case of an implied not of an express right to enter to view the state of the house. In *Torrens v. Walker* (5), however, there was an express right of entry, yet the landlord was held excused unless he had notice. When, moreover, one comes to premises under the Act there are at least three cases where there was an express term giving the landlord a right of entry, viz.: *Hugall v. M'Lean* (6), *London & South Western Ry. Co. v. Flower* (7) and *Morgan v. Liverpool Corporation* (2). In each of these cases it was held that notice was necessary before the landlord's liability could be established. *Hugall v. M'Lean* (6), it is true, came in for some criticism from your Lordships' House in *Murphy v. Hurley* (8), but its conclusion was accepted and in any case the criticism only touched a case where the tenant had or could have no knowledge of the defect beforehand and indeed where a jury had found that the landlord had means of knowledge and the tenant had not. Notwithstanding the criticism

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(1) [1943] A. C. 283.

(2) [1927] 2 K. B. 131.

(3) [1926] 2 K. B. 315.

(4) (1899) 15 T. L. R. 224.

(5) [1906] 2 Ch. 166.

(6) 53 L. T. 94.

(7) 1 C. P. D. 77.

(8) [1922] 1 A. C. 369.

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contained in it, *Murphy v. Hurley* (1), in my view, supports the respondents' contention in the present case. In particular the words of Lord Sumner are apposite. He says (2): "The rule requiring a notice of want of repair by the tenant to the landlord, in the case of an ordinary landlord's repairing covenant . . . is well settled, and no one proposes to alter or restrict it. The nature and the conditions of this rule are, however, equally well settled. As a rule of construction, which reads into the covenant words—namely, 'upon notice'—which are not there, its application naturally depends on the existence of those strong circumstances of necessity, which alone justify the implication of a condition upon an obligation, which is itself expressed unconditionally. Those circumstances are (1.) that the tenant is in occupation and the landlord is not; (2.) that the tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time . . . and (3.), perhaps I may add, that the repairs of dwelling-houses, however frequently required, are still casual and occasional, and not, as here, such as to demand of the landlord incessant vigilance and almost daily care." My Lords, I doubt whether it is accurate to say that a landlord who is under an obligation to repair has no right of access but at least the tenant has the means of knowledge peculiarly in his possession and the requirements of repair are casual. In such circumstances, it would, I think, be unreasonable to require of the landlord the incessant vigilance and almost daily care envisaged by Lord Sumner, even though he had under his contract a right to enter and inspect. Particularly do these considerations apply when the duty imposed on the landlord is so stringent as that falling upon him under the Act. For my own part I find myself in agreement with the result arrived at in *Morgan v. Liverpool Corporation* (3), and in particular with the reasoning and decision of Atkin L.J. (as he then was) in that case. I should add that nothing I have said is meant to affect one way or the other such a case as *Melles & Co. v. Holme* (4), where no notice was given by the tenant, but the landlord had knowledge aliunde of the want of repair or to lessen the landlord's obligation where he keeps part of the premises under his own control and has a constant opportunity of observing the state of repair. I would dismiss the appeal.

(1) [1922] 1 A. C. 369.

(2) Ibid. 387.

(3) [1927] 2 K. B. 131.

(4) [1918] 2 K. B. 100.

LORD SIMONDS. My Lords, this appeal from an order of the Court of Appeal, which affirmed a judgment of the Deputy Presiding Judge of the Court of Passage of the city of Liverpool, is brought to test the correctness of an earlier decision of the Court of Appeal in *Morgan v. Liverpool Corporation* (1). The relevant facts are few and not in dispute in this House. The appellant was at all material times the tenant of the respondent corporation of a dwelling-house, No. 6, Brown Street, in the city of Liverpool. This house, which was subject to the provisions of the Housing Act, 1936, was by reason of the defective condition of two stone steps leading from the kitchen to the back-kitchen not "reasonably fit for human habitation." In consequence of this defect the appellant's wife fell and fractured her leg. The appellant suffered special damage assessed at 70*l*. The question is whether this damage is recoverable in law from the respondents. They have so far successfully contended and contend before your Lordships that it is not recoverable, alleging that no notice of the defect was given to them and that notice is a condition precedent to their liability. It has been found as a fact, and your Lordships will not disturb that finding, that no notice was given. The question of law remains whether notice is a condition precedent to liability. So it was held in *Morgan's* case (1) which must now be reviewed.

[His Lordship read s. 2 of the Housing Act, 1936, and continued:] The first question for consideration is what is the effect of a statutory provision that "in any contract "for letting . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition" In *Ryall v. Kidwell & Son* (2), the same question arose upon s. 14 of the Housing, Town Planning, Etc., Act, 1909, which contained a provision precisely similar, so far as the point now under consideration is concerned, to s. 2 of the Housing Act, 1936, and it was there held that the effect of the enactment was to import a new term into the contract of tenancy and no more. I think that this was manifestly right and respectfully adopt the language used by Lush J. (3): "But the character and quality of the obligation which is "imported by the statute are none the less contractual, "although the contract is derived from and owes its existence "to the statute." To the same effect is the observation of

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(1) [1927] 2 K. B. 131.

(3) Ibid. 143.

(2) [1914] 3 K. B. 135.

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Atkin L.J. in *Morgan's* case (1): "The clause in the Housing Act is imposed as a contractual term and as such it appears to be only available to the tenant because it is a term of the tenancy."

The second question then is what is the meaning and effect of such a provision in a contract of tenancy. It was, I think, rightly decided in *Walker v. Hobbs & Co.* (2) (a decision upon a similar provision in the Housing of the Working Classes Act, 1885), that the word "condition" has no technical meaning. All that is intended by the statute is that the contract is to have effect as if it contained a certain promise, agreement, or covenant, by the landlord.

The rival contentions can now be stated. By the appellant it is said that the promise by the landlord thus imported into the contract is an absolute one, by the respondents that the obligation is not absolute but that it is a condition of liability that notice of the material defect shall be given to them. My Lords, I find it impossible to approach a question of this kind as if similar questions had not for generations been the subject of decisions in the courts of this country and conveyancing practice had not grown up on the faith of them. On a long line of authority beginning with *Makin v. Watkinson* (3) it is clear that on a covenant by a lessor to keep demised premises in repair he cannot be sued for non-repair unless he has received notice of want of repair. In the case cited it appears that the lease did not reserve to the lessor the right to enter and inspect the demised premises and counsel for the appellant has urged that this makes all the difference and that the right of entry given by the imported term distinguishes the present from other cases. I think that this is not a valid distinction. In *London & South Western Ry. Co. v. Flower* (4), the principle was applied though, as Brett J. said: "I will assume also that by implication they had a right to go upon the railway for the purpose of examining the condition of the bridge and ascertaining whether or not it needed repair." So also in *Hugall v. M'Lean* (5) (a case which was, I think, misunderstood in *Fisher v. Walters* (6), itself a decision which is, I think, inconsistent with higher authority and cannot stand). So also in *Torrens v. Walker* (7), where Warrington J.,

(1) [1927] 2 K. B. 131, 149.

(2) 23 Q. B. D. 458.

(3) L. R. 6 Ex. 25.

(4) 1 C. P. D. 77, 84.

(5) 53 L. T. 94.

(6) [1926] 2 K. B. 315.

(7) [1906] 2 Ch. 166, 172.

after referring to *Hugall v. M'Lean* (1), of which case he says : " There, as here, the lease contained a covenant by the lessee " to repair the inside of the premises, and to allow the lessor to " enter and view the state of repair," applied the same principle. I will refer finally to *Morgan's* case (2) again. Atkin L.J. closely examines the principle. I will cite only two short passages, he says (3) : " The result is, to my mind, that in all " cases of that kind, speaking generally, it is a condition of the " liability of the landlord that he should receive notice of the " repairs," and later (4) : " I think the power of access that " is given, extensive though it may be, does not take the case " away from the principle from which the courts have inferred " the condition that the liability is not to arise except on " notice." The judgment that I have cited of Lord Atkin is the more valuable because it was given after the judgment of this House in *Murphy v. Hurley* (5), on which the appellant relies. There, the question being whether notice was a condition precedent to the liability of a landlord to keep in repair a sea-wall erected by him for the common protection of a number of holdings, it was held that it was not. The salient fact was that the sea-wall, so far from being in the exclusive occupation of any tenant was, as Lord Buckmaster said (6), " intended to be " within the control of the landlord." It is, I think, true that in the speeches of Lord Buckmaster and of the other noble and learned Lords who heard the case there are observations which suggest that the principle has no application where the landlord has means of access and therefore means of knowing of the defect, but the ratio decidendi of the case is that the sea-wall was not in the exclusive occupation of any tenant, a fact always held sufficient to exclude the principle, see, e.g., *Melles & Co. v. Holme* (7). In none of the speeches is there any suggestion that the cases in which, though there was a right to enter and therefore means of knowledge, yet the principle was applied, were wrongly decided. It is on this footing that the Court of Appeal decided *Morgan's* case (8) and in my opinion they were right. I conclude, then, that the provision imported by statute into the contractual tenancy must be construed in the same way as any other term of the tenancy and, so construed, does not impose any obligation on the landlord unless and until he has

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(1) 53 L. T. 94.

(2) [1927] 2 K. B. 131, 149.

(3) Ibid. 150.

(4) Ibid. 151.

(5) [1922] 1 A. C. 369.

(6) Ibid. 373.

(7) [1918] 2 K. B. 100.

(8) [1927] 2 K. B. 131.

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notice of the defect which renders the dwelling not "reasonably fit for human habitation." That is the only question which your Lordships have to decide and I do not think it desirable or necessary to consider what may constitute such notice. I will only add that any doubt that I might have had on this case would be removed by the fact that, *Morgan's case* (1), having been decided in 1927 on the Housing Act, 1925, the relevant provisions of that Act were without amendment re-enacted in the Act of 1936 on which this action was founded. It is not easy to believe that the legislature intended the provisions to have any other meaning than that which had been judicially assigned to them. I would dismiss this appeal.

My Lords, my noble and learned friend LORD MACMILLAN has asked me to say that he has read my opinion and concurs in it.

LORD UTHWATT. My Lords, it is provided by s. 2 of the Housing Act, 1936, that in any contract for letting for human habitation a house at a rent not exceeding a specified amount there is, notwithstanding any stipulation to the contrary, to be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation. The Act applies to the tenancy here in question. In one respect the house became not reasonably fit for human habitation. The tenant knew of the defect. The landlord did not, but might have discovered it had he exercised the statutory right of entry and inspection given by sub-s. 2 of s. 2 of the Act. The question at issue is whether in the circumstances the landlord broke the undertaking by his failure to repair the defect. The landlord contends that it is implicit in the undertaking that he should receive from the tenant notice of a defect of which the tenant is aware and the landlord is not, before an obligation to remedy the defect arises. The tenant contends that no such implication ought to be made. On the language of the section it is clear that the effect of the section is to include in the tenancy agreement a contractual obligation binding the landlord to the tenant, not to subject the landlord to a statutory duty of performance. The policy of the statute so far as relevant begins and ends in the birth and continued life of the condition and undertaking as part of the tenancy agreement. The under-

(1) [1927] 2 K. B. 131.

taking of the landlord thrust upon the parties enters into the intendment of the contract and its statutory origin is immaterial in construing it. Any stipulation qualifying the undertaking must by virtue of this Act be disregarded but full effect must be given to any term inherent in the undertaking.

There is no rule of law that, where an obligor is subject to an obligation of a general character which may or may not as circumstances turn out require him to do certain acts, the obligor should be informed by the obligee of the necessity for action under the obligation, or otherwise should become aware of that necessity. But in any contract whatever its nature, it is a general rule that, if the thing agreed to be done cannot effectually be done unless both parties concur in it, the proper construction of the contract requires the implication of a term that each agrees to do all that is necessary to be done on his part for the carrying out of that thing. (See *Mackay v. Dick* (1).) Where the obligation is of the general character that I have mentioned, it may be that, though activity on the part of the obligee is not necessary for carrying out the thing agreed, yet he is implicitly bound in some measure to assist performance. (See *Vyse v. Wakefield* (2).) What, if any, part is assigned to the obligee depends on all the circumstances and is purely a matter of construction. The question is not, whether an implication is permissible, but whether for the business efficacy of the particular obligation, common sense demands it.

The matters bearing on construction which are here relevant are (1.) that the tenant is in exclusive occupation of the property; (2.) that the terms of the undertaking impose very onerous duties which may demand dealing with many comparatively trivial matters discoverable by the landlord, if he is to rely exclusively on his own efforts, only by continuous attention; and (3.) that the landlord has a statutory right to enter and view the state of the property. Two observations may be added. First, the object of the stipulation is the comfort and needs of the tenant, not the physical condition of the property as an isolated fact. Second, the landlord's right to enter and view, though it may help the landlord in complying with his obligation, also serves the landlord as an owner who for his own ends may desire to keep his property fit for human habitation. His failure so to do may entail the pulling down of the house. (See the Housing Act, 1936, s. 11.)

My Lords, in my opinion, it is an implied term, resulting

(1) (1881) 6 App. Cas. 251, 263.

(2) 6 M. & W. 442.

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only from the comprehensiveness of the statutory term and the circumstances necessarily involved in the tenancy, that, in a case where the tenant knows the defect and the landlord does not, the obligation to do a specific act directed to the reparation of that defect does not arise until at least the landlord becomes aware of the need for it. A tenant is entitled to remain inert. Looking at the matter from the tenant's point of view, the true intendment of the undertaking can hardly be that the tenant bargained that, whenever a defect however trivial appeared, he should be disturbed by the work of reparation, whether he wished it or not. Surely the contrary is the case. The landlord, again, cannot at the outset of the tenancy envisage what specific action will be required to maintain the property in habitable condition though he might well envisage that much work would from time to time be required. Looking at the matter from the landlord's point of view, the true intendment of the undertaking can hardly be that continuous and detailed inspection under the statutory power was in contemplation, or that the landlord undertook to do something which he might not know to be demanded by the condition of the property for the benefit of a tenant who knew it was so demanded and who might or might not want it done. Surely a reasonable reading of the undertaking is that for its business efficacy it authorizes abstinence from action by the landlord until at any rate the landlord knows the position or it may be until he is required to remedy it. The only part the tenant is on this basis required to play in performance, is, that knowing what he wants, he should say so. That is, I think, demanded of him by the undertaking. To my mind the implication of a term to this effect is irresistible. The making of the implication, I may add, accords with the long established rule of the law as to the construction of a landlord's covenant to repair. The term is involved in the statutory undertaking : it does not modify it.

That is sufficient to dispose of this appeal. I would only make two observations. Section 2 of the Act of 1936 reproduces verbatim s. 1 of the Housing Act, 1925. In *Morgan v. Liverpool Corporation* (1), the Court of Appeal attributed a particular construction to s. 1 of the Act of 1925. That was a considered decision of the Court of Appeal which had, in 1935, stood unchallenged for more than a decade. There is much to be said for the view that in the Act of 1936 the legislature for the

(1) [1927] 2 K. B. 131.

purpose of the Act of 1936 adopted the construction that had been placed on the Act of 1925. Second, latent defects are not here in question and I express no opinion as to their position in relation to the undertaking. I would dismiss the appeal.

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Appeal dismissed.

Solicitors for appellant : *Isadore Goldman & Son, for Silverman & Livermore, Liverpool.*

Solicitors for respondents : *Cree & Son, for W. H. Baines, Town Clerk, Liverpool.*

[PRIVY COUNCIL]

LUDDITT AND OTHERS APPELLANTS ;

AND

GINGER COOTE AIRWAYS, LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

J. C.*

1947

Feb. 5.

Canada—Carriage by air—Passengers—Injury caused by negligence of carrier's servants — Contract excluding liability — Validity — (Dominion) Transport Act, 1938, S. C. c. 53.

An aeroplane operated by the respondent company caught fire during flight and the appellants, who were passengers for reward, were injured owing to the negligence of the respondent's servants. The contract of carriage was embodied in a ticket which contained a condition signed by each of the appellants, who had notice of the condition, whereby they agreed, inter alia, that the flight should be entirely at their own risk, and exonerated the respondent from liability for loss, damage or injury to them or their property whilst in an aeroplane operated by the respondent, including loss, damage or injury "caused by negligence, default or misconduct of [the "respondent company] itself, its servants, agents or members, or "otherwise howsoever." On a claim by the appellants for damages for the injuries they had sustained :—

Held, that the obligation of a carrier of passengers at common law to carry "with due care" might, subject to such statutory restrictions as existed, be superseded by a specific contract which might either enlarge, diminish or exclude it. There was no reason to hold that any statutory restrictions had been infringed in this case, and no reason under the Transport Act, 1938, of the Dominion, to set aside or refuse to give effect to a specific contract which the

* *Present* : LORD MACMILLAN, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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law authorized. The contract embodied in the ticket containing the condition was therefore valid and enforceable, and the appellants' claim failed.

Peeke v. North Staffordshire Ry. Co. (1863) 10 H. L. C. 473, at 511, distinguished.

Principle in *Grand Trunk Ry. Company of Canada v. Robinson* [1915] A. C. 740, at 747, followed and applied.

Clark v. West Ham Corporation [1909] 2 K. B. 858, distinguished.

Judgment of the Supreme Court of Canada [1942] S. C. R. 406, affirmed.

APPEAL (No. 44 of 1945), by special leave, from a judgment of the Supreme Court of Canada (October 6, 1942) which had affirmed the judgment of the Court of Appeal for the Province of British Columbia (January 13, 1942) whereby it was ordered that a judgment of the Supreme Court of British Columbia (June 25, 1941) should be set aside.

The following facts are taken from the judgment of the Judicial Committee. The three appellants, Alfred William Ludditt, Jack Edward Steeves and William E. Parker, were, on November 29, 1940, being carried as passengers for reward on an aeroplane operated by the respondent company which was flying from the City of Vancouver to Zeballos on Vancouver Island. During the flight the aeroplane caught fire. Owing, as was not now contested, to the negligence of the respondent's servants, each of the appellants was injured. The appellants severally brought an action in the Supreme Court of British Columbia claiming damages for the injury which they had sustained. The express contract was embodied in a single trip ticket from Vancouver to Zeballos, dated November 28, 1940, which was issued by the respondent to each of the appellants, the fare being \$25 for the carriage.

Each passenger signed the ticket before a witness and the most material provision was as follows :—

" This ticket is expressly subject to the conditions below :—

" In consideration of the Ginger Coote Airways, Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways, Ltd., I hereby agree with the Ginger Coote Airways, Ltd. that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways, Ltd. and indemnify it of and from all actions, claims

“ and demands of every nature and kind whatsoever, which I,
 “ or my heirs, executors, administrators or assigns may now,
 “ or may or can at any time hereafter, have against the Ginger
 “ Coote Airways, Ltd., for or on account of any loss, damage or
 “ injury to me, my person or property while so flying, and
 “ whether in or on any such aircraft or getting to or from, into
 “ or off, or in or out thereof; or in any manner in connexion
 “ with or in consequence of such flight, and whether any such
 “ loss, damage or injury be caused by negligence, default or
 “ misconduct of the Ginger Coote Airways, Ltd. itself, servants,
 “ agents or members, or otherwise howsoever.”

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The appellants succeeded in their claim before the trial judge (Sidney Smith J.) and damages were assessed under the judgment in their favour dated June 25, 1941; but that judgment was set aside by a majority of the Judges of the Court of Appeal for the Province of British Columbia (McDonald C.J., B.C., and Sloan J.A.; McQuarrie J.A. dissenting). On an appeal from that judgment to the Supreme Court of Canada that court in its turn by a majority (Rinfret, Hudson and Gillanders (ad hoc) J.J.; Kerwin and Taschereau J.J. dissenting), affirmed the decision of the Court of Appeal. From that judgment the present appeal was brought before the Board pursuant to special leave.

1946. Nov. 7, 8, 11, 13. *Pritt K.C., Diplock and Paul D. Murphy* (of Canadian Bar) for the appellants. Whatever might have been the right of the respondent, in the absence of legislation, to impose conditions in its contracts of carriage limiting its common law liability for negligence as a carrier, such right was, at the relevant date, governed and restricted by the provisions of the Dominion Transport Act, 1938. The first main submission is that the respondent, compelled by statute to set out in schedules and submit to the Board of Transport Commissioners the conditions on which it will carry, cannot render the statutory provisions nugatory by relying on conditions which have neither been set out nor submitted. If it cannot rely on those conditions it had a liability to the appellants to take reasonable care either in contract or in tort. Under the provisions of the Transport Act and, in particular, sub-s. 1 of s. 25 (1), the respondent, as holder of a licence to transport passengers by air between Vancouver and Zeballos,

(1) By the Transport Act, s. 25, “ according to his powers and
 sub-s. 1: “ Every licensee shall, “ within the limits of the capacity

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was under an express statutory duty to afford to the appellants "all reasonable and proper facilities" for being carried as passengers. "Reasonable and proper facilities" necessarily include a right to be carried on reasonable terms and conditions, since, if the carrier were entitled to impose whatever terms and conditions he pleased, the express duty imposed by the statute would be nugatory. A condition exempting the carriers wholly from liability for negligence without giving the passenger any option to be carried on any other terms is unreasonable and thus illegal and void under the Transport Act. The second main submission is that a duty to provide reasonable facilities for carriage of passengers is broken by an operator who charges the maximum fare, refuses to carry on any other terms and eliminates all liability for injury. This involves that the tariff in question is the standard tariff. If the duty to provide reasonable facilities is broken by the terms of the contract the respondent cannot rely on it. Thirdly, I suggest that the respondent is a common carrier, but it matters little whether it is or not; the matter all turns on the effect of the statute.

With regard to the authorities, *Clark v. West Ham Corporation* (1) does help the appellants. Their case would be very closely akin to *Grand Trunk Ry. Company of Canada v. Robinson* (2) if the respondent had obtained the sanction of the Board of Transport Commissioners to these conditions, which it did not. There is a contractual term laid down by the law, invalid conditions have been added, and the special contract is therefore void. It is made clear in *Great Northern Ry. Co. v. L. E. P. Transport & Depository, Ltd.* (3) that a common carrier may impose terms limiting his liability by conditions. *Dickson v. Great Northern Ry. Co.* (4) and *Garton v. Bristol & Exeter Ry. Co.* (5) are also helpful. So far as *Aslan v. Imperial Airways, Ltd.* (6) may contain anything against the appellants it may be pointed out that in that case there were no statutory provisions or restrictions relied on at all, and it is not directly in point. It is submitted that in the present case, as was said by Blackburn J. in *Peek v. North Staffordshire Ry. Co.* (7), "a condition

"of the ships or aircraft specified
 "in the licence, afford to all
 "persons . . . all reasonable
 "and proper facilities for the
 "receiving, forwarding and de-
 "livering of traffic."

(1) [1909] 2 K. B. 858.

(2) [1915] A. C. 740, 744.

(3) [1922] 2 K. B. 742.

(4) (1886) 18 Q. B. D. 176, 184.

(5) (1861) 1 B. & S. 112, 161.

(6) (1933) 149 L. T. 276.

(7) (1863) 10 H. L. C. 473, 511.

“exempting the carriers from liability for the neglect and “default of their servants is prima facie unreasonable.”

With regard to the suggestion, as the two appellate courts below have said, that there were two tariffs or tolls, one a standard tariff, larger than \$25—the cost of the appellants’ tickets—and one a “special” tariff, being the one said to be \$25, it is submitted that it was common ground at the trial that there was only one tariff, \$25, and the trial having proceeded on that footing the respondent ought not to have been allowed to raise this point at all in the court of appeal.

Diplock followed. The suggestion is made by McDonald C.J., B.C. that *Clark v. West Ham Corporation* (1) is contrary to the current of previous authority. It is submitted that that suggestion is founded on a misapprehension of the effect of s. 2 of the Railway and Canal Traffic Act, 1854, of which the first part is in the same terms as s. 25 of the Dominion Transport Act. The effect of s. 2 of the Railway and Canal Traffic Act was to make the railway company, as it was to make the West Ham Corporation, and as it is to make the respondent in this appeal, under an obligation to carry all passengers who pay subject to reasonable conditions. That was laid down in *Dickson’s* case (2), and there appears to have been no decision of the English courts in which it has been held that a railway company can limit its liability for negligence to passengers except when they are travelling at less than the maximum fare. The onus lies on the respondent to show that what is prima facie unreasonable is reasonable, and the way to do that in the ordinary way is to show that there is an alternative tariff at a higher rate.

Sir David Maxwell Fyfe K.C., H. G. Robertson and Patrick Browne for the respondent. When there are, as here, at least three sanctions—criminal sanction under s. 30, sub-s. 2, of the Transport Act; administrative sanction by cancellation of the licence for non-compliance, and a legal sanction that for not complying complaint may be made to the Board of Transport Commissioners under the Procedure of the Railway Act—they are the answer, and not the destruction of the contract. The first point for the appellants was that this company, compelled by statute to set out and submit to the Board the requisite materials, cannot render the statutory provisions nugatory by relying on conditions neither set out nor submitted. The answers to that are : (a) The compulsion of the statute to set

(1) [1909] 2 K. B. 858.

(2) 18 Q. B. D. 176.

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out and submit to the Board is limited in the case of initial tariffs by the foreword to General Order No. 580, which provides that "all initial tariffs . . . filed will be deemed to comply "with the law relative to filing, unless and until they are "rejected by the Board" (b) The conditions were set out and submitted. (c) If there was non-compliance, it did not make the statutory conditions nugatory. (d) The fact that the Board did not know the actual conditions on the ticket—if this be the case—does not make them ultra vires. (e) In view of the three sanctions for breach of statutory provisions, a breach does not impliedly forbid the making of a limiting contract, and there is no express prohibition. If this \$25 is a special tariff, there is no question it was submitted, and that is enough. If it is a standard tariff, I say that it has been submitted and the Board have said that in the case of an initial tariff it will be effective unless it is disallowed. To be effective it must be approved, and therefore the Board must be taken to have approved it within s. 21, sub-s. 2, of the Transport Act, which provides that "every standard tariff . . . shall "require the approval of the Board before it becomes effective." The Board is given notice of what conditions are going to be attached to the tickets, and it must be taken to know that they contain conditions as to liability. The statutory requirement is not made nugatory if the Board is given a clear reference in regard to it. Then there is no question that the travelling public see the conditions before they travel; in this case they signed them. There is no monopoly; they could have travelled by other air companies. It really comes down to whether the statute forbids the making of this contract. The conditions contained in the tickets are valid and effective both at common law and under the applicable Canadian legislation.

The second point on behalf of the appellants was that a duty to provide reasonable facilities for carriage of passengers is broken by an operator who charges the maximum fare, refuses to carry on any other conditions and eliminates all liability for injury—(this involves that the tariff in question is the standard tariff)—and that if the duty to provide reasonable facilities is broken by the terms of the contract the respondent cannot rely on it. It is submitted in answer, first, that this point is not raised by (a) the pleadings, or (b) the judgments against the respondent below, and is one to which evidence, e.g., of the practice of other carriers by air, could have been directed. Secondly, reasonable facilities in s. 2 of the Railway

and Canal Traffic Act of 1854 relates solely to obligations which rest on railway companies to perform services, and does not deal in any way with the terms on which those services are to be performed: per Fletcher Moulton L.J. in *Spillers & Bakers, Ltd. v. Great Western Ry.* (1). The same construction should be put on the phrase under the Canadian Transport Act. The following authorities support that view: *Great Western Ry. Co. v. Railway Commissioners* (2); *Reg. v. Railway Commissioners and Distington Iron Co., Ltd.* (3). The judgment in *Sutcliffe v. Great Western Ry.* (4) implies that if s. 2 of the Act of 1854 had stood without s. 7, as in the Canadian Transport Act, the carrier would be entitled to make whatever conditions he could validly make at common law. I adopt the reasoning of Leslie on Law of Transport by Railway, 2nd ed., p. 680, et seq., in his criticism of *Dickson's* case (5). Lord Halsbury in *Williams v. Midland Ry.* (6) said that "if it were necessary to discuss further the case of *Dickson v. Great Northern Ry. Co.* (5), which, however, is binding in this court, I might not be prepared to agree with all that was said in that case." An alternative point under this submission is that under s. 26 of the Canadian Transport Act the absence of objection by the Board shows that the terms and conditions are reasonable. The argument is that if it is wrong to say that "reasonable facilities" are confined to services, and that they should include the terms and conditions of the contract, then this has not been disallowed under s. 26, and therefore I am entitled to say that the terms and conditions are reasonable. The next point is that even if the duty to provide reasonable facilities is broken by the terms of the contract, that does not mean that the respondent cannot rely on the contract—the three sanctions have already been mentioned. Lastly, there is a decisive difference between an obligation to provide reasonable facilities and an obligation to carry with a maximum fare as in *Clark's* case (7). On the statutes applicable in that case the court held that the legislature had fixed all the terms of the contract, including full liability for negligence—in relation to the fare: see per Kennedy L.J. (8). In the present case the Board, at the lowest, had notice that there were some conditions on the ticket, and must have allowed the fare in relation to this

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(1) [1911] 1 K. B. 386, 398.

(2) (1881) 7 Q. B. D. 182, 192-3.

(3) (1889) 22 Q. B. D. 642, 649.

(4) [1910] 1 K. B. 478, 494.

(5) 18 Q. B. D. 176.

(6) [1908] 1 K. B. 252, 259.

(7) [1909] 2 K. B. 858.

(8) *Ibid.* 883.

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fact. It is a fallacy to say that the legislature, in fixing maximum charges, necessarily intends to link these charges with full common law rights in other respects. The statutes in *Clark's* case (1) fixed all the terms of the contract; they cannot be so construed in the present case.

Pritt K.C. replied.

1947. Feb. 5. The judgment of their Lordships was delivered by LORD WRIGHT, who stated the facts set out above and continued: There is no dispute on the facts or as to the amount of damages. The sole question is whether the express condition contained in the ticket issued to each of the appellants which exempted the respondent from liability is valid so as to exonerate that company from any obligation to compensate the appellants for their injuries; or whether it is illegal and void. The answer to the question depends on the express terms of the ticket, the general law, and the relevant conditions of the Transport Act, 1938, and the Orders of the Board of Transport Commissioners established under s. 3 of the Act, which has for one of its purposes the control of contracts of this type.

It is not suggested that the appellants and each of them had not sufficient notice of this condition when the tickets were signed. The condition itself is clear and unambiguous; nevertheless the learned judge in the first court and the dissenting judges in the appellate courts in Canada have held it illegal and void. Their Lordships dissent from this view and agree with the decisions of the majority of the judges in the Provincial Court of Appeal and in the Supreme Court of Canada that the condition is valid and enforceable for the reasons which they will now state.

It will be convenient in the first place to explain what is the general law on the subject before discussing the special legislative provisions which are relevant. The liability of a common carrier of passengers was settled by the decision of the Exchequer Chamber in 1869 in *Readhead v. Midland Ry. Co.* (2). It was there held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law "bound to answer" for the goods at all events . . . The law charges this person "thus entrusted to carry goods against all events but acts of God and of the enemies of the King" (3). The carrier of

(1) [1909] 2 K. B. 858.

(3) *Ibid.* 382.

(2) (1869) L. R. 4 Q. B. 379.

passengers is not subjected to a duty so stringent. His obligation at common law, as was held in the leading case just cited, is to carry "with due care." One reason for the distinction, no doubt, is that the carrier of goods is a bailee of the goods which he carries, whereas a carrier of passengers it not a bailee of his passengers. Both classes of carriers, however, are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry, subject to the obvious limiting conditions.

The common carrier of goods was nevertheless at common law free to limit his stringent obligations by special contract. He still remained a common carrier, and was bound to carry for all according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms, provided that there were no statutory conditions limiting his right. The classical exposition of this principle is to be found in the language of Blackburn J. in advising the House of Lords in *Peck v. North Staffordshire Ry. Co.* (1). The issue in that case was as to the effect of s. 7 of the Railway and Canal Traffic Act, 1854, which imposed certain conditions on railway companies seeking by special contract to limit their liability in respect of goods which they carried as common carriers. Under these statutory conditions such contracts were only valid if they were in writing and were just and reasonable. But apart from the Act the general freedom possessed by carriers was unimpaired, and the Act clearly had no reference to the conveyance of passengers. It was therefore only with reference to carriers of goods that Blackburn J. observed at p. 511 that a condition exempting the carriers wholly from liability for the neglect and default of their servants was *prima facie* unreasonable (2). When making that observation that learned judge was discussing the effect of s. 7 of the Act which, as already stated, contained an express enactment that the terms of the special contract should be reasonable, and it was in that connexion that he went on to say that an offer to carry at a lower rate than the normal rate might be reasonable for purposes of the Act. He added: "For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option" (3).

(1) 10 H. L. C. 473.

(3) *Ibid.* 512.(2) *Ibid.* 511.

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But this principle, stated in regard to a railway company as a carrier of goods and in regard to the operation of the Railway and Canal Traffic Act, has no bearing on the position of a carrier of passengers whose complete freedom at common law to make such contracts as he thinks fit, has not been curtailed by the Act of 1854. What limitations on this freedom result from the relevant legislation for the control of the carriage of passengers by air will be examined later, but light is thrown on the common law position of carriers of passengers by the decision of this Board in *Grand Trunk Ry. Co. of Canada v. Robinson* (1). The main question in that case was whether a passenger carried at half fare under what was called a "live-stock special contract" was bound by a term of the contract giving the carrier complete exemption from liability even when caused by the negligence of the railway company. A subsidiary question was whether the passenger, who went on the train to look after a horse during the transit, was bound by the special contract which his employer had made on his behalf. The subsidiary issue, which was decided against the man, is not material in this case, but the general law was stated by Lord Haldane L.C., delivering the judgment of the Board, in the following terms (2): "There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him."

Their Lordships accept this statement of general principle,

(1) [1915] A. C. 740.

(2) Ibid. 747.

and therefore must now consider the effect in this case of such statutory restrictions as exist in Canada in order to determine whether they qualify or supersede the exemption of liability for negligence which is clearly set out in the contract agreed to and signed by each of the appellants as already stated. The legislative provisions to be considered are to be found in the (Dominion) Transport Act, 1938, in certain Regulations made thereunder by the Board of Transport Commissioners for Canada, and in certain "schedules" containing its tariffs and regulations, which were drawn up by the respondent under powers conferred on it by the Regulations of the Board. The general effect of the Transport Act, 1938, so far as concerns matters arising in the present case, is to lay on every operator licensed to operate aircraft the obligation to afford to all persons all reasonable and proper facilities for the conveyance of passenger and goods traffic; further, to oblige operators to file "standard tariffs" of their charges, which themselves are subject to the approval of the Board; and, lastly, to empower operators to file, in addition to their standard tariffs, "special tariffs" lower than their standard tariffs. All the material provisions of these instruments have been elaborately analysed by the Chief Justice of the Supreme Court of Canada and need not here be repeated in detail. It should, however, be observed that by the Transport Act the Board of Railway Commissioners for Canada as constituted under the Railway Act (R. S. C. 1927, c. 170) are designated to act as the Board of Transport Commissioners for Canada, and are vested with the duties of licensing aircraft to transport passengers between various points in Canada and of approving tolls to be charged or made in connexion with the transport of passengers. The respondent had obtained, and at all material times held, the necessary licence permitting it to transport passengers on its aircraft between Vancouver and Zeballos.

Part IV. of the Transport Act contains a code of provisions relating to "Traffic, Tolls and Tariffs," to which all licensees under the Act must adhere. The provisions of this part, so far as they are relevant to this appeal, are to be found in ss. 16, 17, 19, 20, 21, 22, 24, 25, 26, 32 and 33. In pursuance of the powers conferred by this Part, the Board of Transport Commissioners have issued two General Orders, Numbers 580 and 584, dated respectively December 16, 1938, and March 23, 1939, containing regulations "governing the construction and filing of air transportation tariffs." When entering on their

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duties under the Act the Board were taking under their control a wide variety of existing services, and accordingly special attention is drawn to the "Foreword" forming part of General Order 580 in which the Board announces its decision not to exercise its powers by imposing forthwith a pre-conceived plan for the detailed control of air services, but to impose on the traffic arrangements of individual carriers such modifications or restrictions as experience may show to be necessary. In the third paragraph of the "Foreword," the Board laid down the following general rule as to initial tariffs or schedules: "All initial tariffs or schedules filed will be deemed to comply with the law relative to filing, unless and until they are rejected by the Board with directions to file other tariffs or schedules in lieu thereof." The respondent duly filed with the Board a special Passenger and Goods Tariff incorporating by reference a tariff of rules and regulations which were drawn up by it on the same date and specified that passengers were carried only in accordance with the terms and conditions of the respondent's passenger ticket. The fare of \$25 paid by each appellant was that prescribed by the Special Passenger Tariff just referred to, and some question arose whether the fare was a special or standard fare within the tariff filed. Special tariffs were defined as those specifying a toll or tolls lower than the standard tolls, but there was no evidence that any other toll than \$25 for the journey had been filed, or that it had been approved by the Board. If, however, it was a special tariff no approval was required, and in any case their Lordships agree with the conclusion of the Supreme Court that there is no ground for holding that the provisions of the Act were not satisfied. In particular, there is no ground for holding that the fare charged and the terms of the contract, which were either actually or by sufficient reference before the Board, were not duly approved. There was thus no reason to hold that statutory restrictions had been infringed, and no reason under the statute to set aside or refuse to give effect to a specific contract which the law authorizes. Such a contract cannot be pronounced unreasonable, invalid or illegal by a court of justice.

The contrast between the provisions of the Canadian Transport Act and s. 7 of the English Railway and Canal Traffic Act is that whereas the former requires an administrative decision of the Board to be complied with, the latter leaves it to the court to determine whether its provisions have been carried out.

It follows, in their Lordships' judgment, that there is no valid reason against holding the appellants and each of them bound by their contract.

In their Lordships' opinion the view they have expressed provides an answer to the contention, so strenuously urged, that if the passenger is not given an option either to retain his full rights against the carrier at the higher fare or to waive them in whole or in part at the lower, the specific contract must be invalid. As their Lordships have pointed out Blackburn J. in *Peek's* case (1) merely said that such a contract may (not must) be invalid, and he only said that in reference to the construction of s. 7 of the Railway and Canal Traffic Act. Indeed, even if the carrier were obliged to comply with the conditions imposed by s. 7, it might be considered that a carrier of passengers by air could reasonably, if he thought fit, refuse to carry anyone save at the passenger's own risk. It does not matter for this purpose whether the carrier was a common or general carrier or not. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. A carrier of goods or of passengers may or may not be a common carrier. In the words of Maule J., quoted by Atkin L.J. in *G. N. Ry. Co. v. L. E. P. Transport & Depository, Ltd.* (2): "I deny the truth of the position that "a man who is not an insurer is therefore not a common carrier. "A common carrier who gives no notice limiting his responsibility, is an insurer; but, if he gives notice that he will "contract only to a limited extent, and with respect to articles "of a given value, he ceases to be an insurer beyond that, "though in all other respects he remains a common carrier." In this passage Maule J. is speaking of carriers of goods, but the same principle is true, *mutatis mutandis*, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers. From this aspect it is not material whether he is a common carrier or not—nor is his position altered by the terms of s. 25, sub-s. 1, of the Transport Act, which require the carrier to afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic, inasmuch as this provision does not, in their Lordships' judgment, relate to the particular terms of any special contract or their reasonableness, but simply to external physical and mechanical facilities.

(1) 10 H. L. C. 473.

(2) [1922] 2 K. B. 742, 771.

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Finally it may be observed that their Lordships do not regard the decision of the Court of Appeal in *Clark v. West Ham Corporation* (1) as giving any real help or guidance in the decision of the present appeal. While they do not think it necessary to give any opinion on the correctness of much that was said in that case, or of the actual decision, the judgment at least of the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the corporation for the carriage of passengers. These statutory regulations were substantially different from those in question in this appeal.

For all these reasons their Lordships will humbly advise His Majesty that the appeal in their judgment fails and should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Gasquet, Metcalfe & Walton.*

Solicitors for respondent: *Beaumont & Son.*

(1) [1909] 2 K. B. 858.

[PRIVY COUNCIL]

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ON APPEAL FROM THE SUPREME COURT OF PALESTINE
 AT JERUSALEM.

Palestine—Emergency legislation—Order of deportation—Direction for detention in Eritrea—Legality—Habeas corpus—Emergency Regulations, 1936, regs. 15, 15B—Defence Regulations, 1939, reg. 17G—Palestine Order in Council, 1922, s. 46.

The appellant's son, a Palestinian citizen, was arrested in Palestine pursuant to an order made under reg. 15B of the Emergency Regulations, 1936, and was subsequently removed to Eritrea under custody of the respondents—the General Officer Commanding Palestine, representing the Commander-in-Chief, Middle East, and the Inspector-General of Police and Prisons,

* *Present*: LORD WRIGHT, LORD PORTER, LORD UTHWATT,
 SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

Jerusalem—by virtue of an order of deportation made under reg. 15 of the Emergency Regulations, 1936, and a direction made under reg. 17G of the Defence Regulations, 1939. He was detained under military custody in Eritrea, which was at all material times held by the British under military government under the control of a Chief Administrator, and was not subordinate to the Palestine Government. The deportee was detained in Eritrea under an order of the Eritrean military government made under the provisions of a Proclamation by the Chief Administrator which provided that "where any person has . . . by order of a "competent authority been transferred to the occupied territory, "the Chief Administrator may order his detention after arrival "in the occupied territory." A petition by the appellant to the Supreme Court of Palestine, sitting as a High Court, for an order in the nature of habeas corpus to be directed to the respondents on the ground that his son was being unlawfully detained by one or both of them as they had no power to detain and keep him in custody abroad, having been dismissed :—

Held, that by virtue of s. 46 of the Palestine Order in Council, 1922, English common law rules evolved in respect of habeas corpus were applicable in Palestine, and that the detention must be illegal lay at the root of the whole matter. The order of deportation and the ancillary powers of providing a place to which the deportee might proceed were legal as being within the competence of the Palestine Government under the relevant statutory emergency and defence provisions. No court in Palestine had authority to require production of the deportee in that country in defiance of an order lawfully made by its responsible Government, and the Palestine court had no jurisdiction to inquire into the legality of the order made by the responsible governing authority in Eritrea under which the deportee was detained in that country, and no ground for questioning that order.

Secretary of State for Home Affairs v. O'Brien [1923] A. C. 603, distinguished.

Order of the Supreme Court of Palestine (1945) 12 P. L. R. 556, affirmed.

APPEAL (No. 43 of 1946), by special leave, from an order of the Supreme Court of Palestine sitting as a High Court (December 18, 1945) which discharged a rule nisi granted on the appellant's petition for an order in the nature of habeas corpus in respect of Arie Ben Eliezer, the appellant's son.

The following facts are taken from the judgment of the Judicial Committee. The appellant's son was a Palestinian citizen, and had arrived in Palestine at some date before April 17 1944, from the United States of America. On that date he was arrested by the police authorities in Palestine acting by virtue of an order made under reg. 15B of the Emergency Regulations, 1936, and on or about October 19, 1944, was removed from

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Palestine to Eritrea under custody of the respondents and personnel under their command acting by virtue of an order of deportation made under reg. 15 of the Emergency Regulations, 1936, and of a direction made under reg. 17G of the Defence Regulations, 1939. From and after his arrival in Eritrea he was detained under an order of the Eritrean Military Government in a detention camp in that country, but was later transferred for a period of time to a detention camp in the Sudan, from which he was eventually brought back to the detention camp in Eritrea where at the inception of these proceedings he was, and he still was, detained.

On October 26, 1945, the appellant filed in the Supreme Court of Palestine, sitting as a High Court of Justice, Jerusalem, a petition dated September 4, 1945, praying for an order in the nature of habeas corpus to be directed to the respondents in respect of his son, and on November 6, 1945, that court made an order nisi directing the issue of a summons in the nature of habeas corpus to the respondents as prayed by the appellant and ordering the respondents to file their reply, if so advised, within fifteen days from the date of service of the order.

In those circumstances, affidavits in opposition to the granting of the petition were filed, and after hearing the arguments and discussing the evidence, the Supreme Court, sitting as a High Court (FitzGerald C.J. and Shaw J.), discharged the rule and dismissed the petition.

1946. Dec. 2, 3, 4. *Devlin K.C., I. H. Jacob and M. Seligman* for the appellant. The orders did not give power to the Palestine authorities to detain any person outside Palestine. The person who controlled the military camps in Eritrea was the Commander-in-Chief, Middle East, who is the real respondent to this appeal. The Supreme Court were satisfied that the alleged order of October 4, 1945, by the Chief Administrator of Eritrea was made at the instigation, persuasion or representation of the Palestine authorities, and the court also accepted the principle of de facto control that has been applied in these cases, that is to say, that notwithstanding that a person may be detained by someone other than the respondent either nominally or legally in some other English colony, if the court is satisfied that the respondent has de facto control over him the writ will issue. The court considered, however, that that principle did not apply in a case where some competent authority in the country of detention had made an order which

was legally binding. It was on that ground that they refused the application, and accordingly the main question is whether the principle of de facto control is applicable to this case. It is submitted that it is. De facto means the position in fact and not in law, and the question is, who detains in fact, and if it be found that the respondent is detaining the writ will issue. The only inference is that there was de facto control by the respondent, and it is contended that, apart from the Eritrean order, the Supreme Court was satisfied in this case that if the Palestine authorities had requested that the detention should be brought to an end it would have been—that there was de facto control. The English common law principles with regard to habeas corpus have been imported into the law of Palestine by s. 46 of the Palestine Order in Council, 1922 : *Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi* (1). If once it is established that a man has had the custody of a person, and that after proceedings had been threatened he transfers that person to somebody else, by those facts alone there is practically set up a case which requires inquiry and a writ will issue and the facts be gone into. Two things in *Barnardo v. Ford* (2) make it a stronger case than the present (a) there was an explicit denial of knowledge of where the child was, and (b) the custody of the child had been parted with some time before there was any question of habeas corpus. Here a step was taken after the threat of proceedings, which suggests that the Palestine authorities were anxious to pass the nominal control into other hands. *Rex v. Crewe (Earl)*, *Ex parte Sekgome* (3), deals to some extent with the question of control as it affects a person in the position of the Colonial Secretary in this case, and secondly, it is authority with regard to the writ at common law running to any territory which is in the subjection of the King. *Rex v. Secretary of State for Home Affairs*, *Ex parte O'Brien* (4), is more nearly in point. With regard to what amounts to control, the authorities show two things : (a) that there need not be actual custody, and (b) that the control need not be legal control, that is to say, the person need not be in the hands of an agent who is legally obliged to obey orders given to him by the respondent ; it goes further than that. The courts have been careful not to define exactly what

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(1) [1941] A. C. 274.

(2) [1892] A. C. 326.

(3) [1910] 2 K. B. 576, 592,

618, 629.

(4) [1923] 2 K. B. 361, 391

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is the degree of control that is applied, but they have used the term, *de facto* control, and it is submitted that that means that control is to be left, so to speak, as a jury question. It is for the court, applying its mind to a question of fact, to say whether there is control in the ordinary sense of the word, looking at the realities of the situation. The respondent has to show whether he has parted with the control absolutely or only conditionally, and if conditionally, the writ would issue. Apart from the legal effect of the Eritrean order, there is here a *prima facie* case of control against the respondent. The court should not require too high a degree of proof, otherwise it might paralyse the whole procedure of *habeas corpus*: *Cox v. Hakes* (1). The fact of the issue of the Eritrean order shows some degree of communication with the Palestine authorities, and leads to the inference that that order was made at the instigation of, or procured by, the Palestine authorities, and is some evidence of whether there is a *prima facie* case of control against them. The court below was satisfied that there was *de facto* control, but they misdirected themselves, it is submitted, as a matter of law because, having reached the right conclusion of fact, they said that they could not give effect to it because of the Eritrean order.

If the Board is of opinion that there was *prima facie* control, the Eritrean order has to be considered from a number of angles, the first being whether it really makes any difference at all. It is not a legislative Act. The true view is that the order does not alter the quality of the detention and leaves the position as it was on October 3, 1945. Next, the right view is that the court ought to inquire into the validity of the order, but that it has not at present the materials before it to do so, and consequently the respondents' case is to that extent defective and on the return they must make it good. Assuming, however, that the Eritrean order is a valid document, and that there is no need for any further inquiry, if the Board has accepted my submission as to the true meaning of control it cannot make any difference, if there is in reality control over a person, whether it is held by virtue of some legal instrument or otherwise—it is the *de facto* position which has to be considered; there is no authority on this point. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 9, p. 734, para. 1252.] Next, the validity of the deportation order stands or falls according to the validity of the detention in Eritrea. If this

(1) (1890) 15 App. Cas. 506, 514.

order was made not as an end in itself, simply to deport a person, but merely as a step in the consummation of an act of illegal detention in Eritrea, the order itself would be bad. Lastly the order should have been produced : *Rex v. Clerk* (1), *In re Power and Jackson* (2); *In re Clarke* (3); and *Rex v. Secretary of State for Home Affairs. Ex parte Greene* (4).

Le Quesne K.C. and *Gahan* for the respondents. In both *Barnardo v. Ford* (5) and *Secretary of State for Home Affairs v. O'Brien* (6) it is plain that the courts attached the greatest importance to the fact that someone was being detained illegally. *Prima facie*, a case of illegality must be shown—that underlies the whole of the law on this matter and is the whole basis of the intervention of the court : *In re Newton* (7); *Barnardo v. Ford* (8) and *Greene v. Secretary of State for Home Affairs* (9). The appellant here has failed to establish any illegality as regards the detention in Eritrea; he has to prove two things to the satisfaction of the court (a) illegality, and (b) *de facto* control on the part of the person to whom he desires that the writ should be directed. The Commander-in-Chief, Middle East, was not within the jurisdiction of the Palestine court and proceedings could not properly be taken against him by making his subordinate in Palestine a party to the proceedings as representing him. There is no evidence that the first respondent, the General Officer Commanding Palestine, had authority to accept service or legal documents intended for the Commander-in-Chief, Middle East. As regards the second respondent, the Inspector-General of Police and Prisons, it is very difficult for it to be deemed that he is exercising any kind of control over the detention of these persons in Eritrea. The appellant says that this is really an application against the Government of Palestine which, it is said, is really in control of this detention in Eritrea. If, in fact, that was the application which it was desired to make, it ought to have been made against the High Commissioner. It cannot be treated as an application against the Government of Palestine, but supposing it is looked at in that way, the next step would have to be to show that there was an illegality.

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| (1) (1696) 1 Salk. 348. | (5) [1892] A. C. 326. |
| (2) (1826) 2 Russell 583. | (6) [1923] A. C. 603. |
| (3) (1842) 2 Q. B. 619. | (7) (1849) 13 Q. B. 716, 730. |
| (4) [1942] 1 K. B. 87, 107, 118; | (8) [1892] A. C. 326, 339. |
| [1942] A. C. 284. | (9) [1942] A. C. 284, 302. |

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The alleged illegality would be detention in Eritrea—detention in a country at present occupied by our military forces. He would not establish an illegal detention by saying that he was being detained by the military forces, because that is a matter well within the power of the Officer Commanding those forces. The deportee was at the relevant time detained in Eritrea by virtue of a lawful order of the Chief Administrator of Eritrea, and the court in Palestine had no jurisdiction to inquire into the legality of that order. At the relevant time the deportee was not in the custody of the respondents or either of them. Even assuming it to be true that, on the request of the proper official in Palestine, the Eritrean authorities would be prepared to allow the release of this deportee, the fact would still remain that the detention in question could not be called illegal: it is quite possible for these two things to exist side by side, and that is a very far state of affairs from *O'Brien's* case (1). Assuming that these proceedings are treated as against the Palestine authorities, they would fail because there is no illegal detention, but quite apart from that, even if the court should come to the conclusion that there was illegal detention, and that the Palestine authorities had control, that would be no reason for directing the issue of a writ against the Commander-in-Chief, Middle East, and the Inspector-General; they are not the proper persons at all if the writ is to be against someone described as the Palestine authorities.

Devlin K.C. replied. Somebody in Palestine must exercise effective control as in *O'Brien's* case (1). The High Commissioner cannot be sued in the courts in Palestine—he is in the same position as the Crown, and he acts through his officials. The point was not taken below. On the evidence the Board ought to be satisfied that the proper official is the Inspector-General: *Rex v. Vine Street Police Station Superintendent, Ex parte Liebmann* (2); *Rex v. Knockaloe Camp Commandant, Ex parte Forman* (3).

1946. Dec. 4. LORD WRIGHT announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed, and that they would give their reasons later.

1947. Feb. 25. The reasons for their Lordships' report were

(1) [1923] A. C. 603.

(3) (1918) 87 L. J. (K. B.) 43.

(2) [1916] 1 K. B. 268.

delivered by LORD WRIGHT. In this appeal their Lordships, after hearing arguments from counsel on both sides, announced that they had decided to advise His Majesty that in their judgment the appeal should be dismissed, and added that they would give their reasons later. This they now proceed to do. [His Lordship then stated the facts set out above, and continued :] Before referring to the documents and orders in the case it may be useful to indicate shortly what is the constitutional or international position of Palestine. That topic was discussed by this Board in *Jerusalem-Jaffa District Governor v. Suleiman Murra* (1), when the question at issue was whether an Ordinance issued by the High Commissioner for the expropriation for public services of certain property was ultra vires as not providing for adequate compensation. The Board held that the Ordinance was not ultra vires. Lord Cave, delivering the judgment of the Board, referred to the Mandate for Palestine, dated July 24, 1922, whereby the Council of the League of Nations, acting under art. 22 of the Covenant of the League entrusted to Great Britain the territory of Palestine. That Mandate is still treated as de facto operative quoad the duties it imposes, though the League of Nations may no longer function. It imposes (inter alia) the responsibility on the Mandatory of "safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." Lord Cave stated the general position thus (2): "By the Palestine Order in Council dated August 10, 1922, provision was made for the administration of Palestine by a High Commissioner with full executive powers; and authority to make Ordinances for the peace, order and good government of Palestine was entrusted to a Legislative Council, subject to a provision that no Ordinance should be passed which should in any way be repugnant to or inconsistent with the provisions of the Mandate. The institution of a Legislative Council did not prove successful; and on May 4, 1923, an amending Order in Council was made by which the legislative authority was transferred to the High Commissioner, who was thereby authorized to promulgate such Ordinances as might be necessary for the peace, order and good government of Palestine, subject to a condition that no Ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate."

As to what law is administered in Palestine, light may be

(1) [1926] A. C. 321.

(2) Ibid. 325.

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derived from the judgment of this Board in *Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi* (1), where the dispute had reference to the construction of a contract. Lord Atkin quoted in full s. 46 of the Palestine Order in Council of 1922 as follows (2): "The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on November 1, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such Orders in Council, ordinances and regulations as are in force in Palestine at the date of the commencement of this order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary." Lord Atkin was dealing with a dispute whether the common law doctrine of the difference between penalty and liquidated damages could be applied to the words of a Palestine contract; it was claimed that the bond must be enforced in full and could not be treated as being a penalty according to the common law distinction. Lord Atkin went on to say (3): "The code speaks in a legal system which does not know penalties as such—in which an agreement to pay damages must, therefore, be strictly enforced 'no more and no less.' But when the difference between penalty and liquidated damages is introduced into the legal concepts which now, owing to s. 46 of the Order in Council, form the jurisprudence of Palestine, the terms of art. III can be given a plain and just meaning."

These general principles must be kept in mind when the effect of the Ordinance and order out of which the case arises is being

(1) [1941] A. C. 274.

(3) Ibid. 281.

(2) Ibid. 280.

considered. Habeas corpus is perhaps the most characteristic writ known to the English common law. As Lord Birkenhead said of that writ in *Secretary of State for Home Affairs v. O'Brien* (1): "It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." It is accordingly clear that the common law rules which have been evolved on this topic by the English Courts will be applicable in the court in Palestine, and that these rules will govern the decision. But the detention must be illegal, as Lord Birkenhead emphasizes by repeating the word. That lies at the root of the whole matter. It is for "illegal restraint or confinement" that "the swift and imperative remedy" may be invoked. It is not enough to show that there has been interference with the liberty of the subject: it is essential that it should be shown to be illegal, as it manifestly was in the *O'Brien* case (1). In the troublous times of war and in the chaotic post-war conditions the scope of legal and permissive interference with personal liberty has been extended and restraints have been legalized by the legislature which would not have been accepted as legitimate in normal times. Thus in England, in what are called the Reg. 18B cases, *Liversidge v. Sir John Anderson* (2) and *Greene v. Secretary of State for Home Affairs* (3), the House of Lords upheld the legality of a detention of the applicants by the Executive without trial and also held that the Executive could not be compelled to give its reasons for the detention. The Executive was, in these respects, exercising an emergency power vested in it by the legislature. There was a restraint outside the ordinary course of law, but it was not illegal because it was justified by the terms of the Statutory Regulation which gave the power and imposed the duty for the purpose of securing the defence of the realm during the world war which has recently ended. A somewhat similar rule of law applied during the war of 1914-1918—see *Rex v. Halliday* (4).

In these and many similar cases the restraint or confinement was held not to be illegal, and the effect of the decisions is to

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(1) [1923] A. C. 603, 609.

(3) [1942] A. C. 284.

(2) [1942] A. C. 206.

(4) [1917] A. C. 260.

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vest a plenary discretion in the Executive, affecting the liberty of the subject and pro tanto to substitute for the judgment of the court, based on ordinary principles of common law right, the discretion of the Executive acting arbitrarily in the sense that it cannot in substance be inquired into by the court. This is a serious interference with the liberty of the subject, but it is not illegal so long as the detention conforms to the requirements of the statute or order on which it is based. It has sometimes been said that the remedy of habeas corpus is suspended during these temporary and emergency laws. But that is not so. There is no occasion in such cases for its suspension because, as was pointed out in the House of Lords in *Greene's* case (1) there is no illegality. The British nations have borne these temporary encroachments on their common law freedom because they were necessary for the safety of the country and were required by the paramount need of preserving its peace and good government.

But these considerations do not dispose of the case; the Mandate requires the Government of Palestine to make Ordinances for that purpose and therefore the order of deportation was legal as being within the powers so given. Nevertheless it is said that detention in Eritrea is outside the competence of the Executive in control of Palestine and that that Executive is in fact detaining the petitioner's son and can if they wish bring about his release even though the Eritrean authorities are the nominal jailors and though they assert that the detention in Eritrea is not illegal according to the law of that country.

The order of arrest, as already stated, purported to be made under the Palestine (Defence) Order in Council, 1937, and the Emergency Regulations, 1936. It was dated October 18, 1944, and is headed "Order of Deportation." It is signed by the officer administering the Government of Palestine and recites that reg. 15 of the Emergency Regulations, 1936, empowers the High Commissioner of Palestine to make a deportation order requiring any person to leave and remain out of Palestine and that it is necessary and expedient that a deportation order should be made in respect (inter alios) of Eliezer. It then proceeds to require him to leave and thereafter remain out of Palestine, and orders him to be kept in the custody of the Commander-in-Chief, Middle East, and the Inspector-General of Police and Prisons, Palestine, and personnel under their command while awaiting deportation and while being conveyed

(1) [1942] A. C. 308.

out of Palestine. On the same day the same officer issued a direction under reg. 17G of the Defence Regulations of Palestine, 1939, which provides that where under any Ordinance or other law for the time being in force in Palestine any person has been lawfully ordered to be deported from Palestine the High Commissioner may make arrangements with the appropriate authorities of any territory outside Palestine for the reception of the persons ordered to be deported. After reciting the order of deportation just referred to this direction stated that arrangements had been made with the appropriate authorities in the territory of Eritrea, and that the officer administering the Government of Palestine was of opinion that it was necessary in the interests of public safety and the defence of Palestine that the person in question ordered to be deported should be kept in custody while being conveyed from Palestine to Eritrea.

These directions were duly carried out, and Eliezer and the other persons named in the orders were conveyed to Eritrea and kept there under military custody. In ordering these persons to be deported and in arranging for the place of deportation to be Eritrea, and for their conveyance there, the Government of Palestine purported to exercise the emergency powers vested in them. Though the exact organization adopted for governing Eritrea at the material date has not been shown in evidence, it is sufficiently clear that it is territory captured from the Italians during the war, and was at all material times held by the British under military government. It was and is in no way subordinate to the Palestine Government but is under the control of a Chief Administrator, who is the head of the Military Government. It is not suggested that any court in Palestine had authority to issue the writ or ensure its execution in Eritrea, and it does not seem to be disputed that Eliezer came under the control of the military authorities there. The documents produced show that Brigadier McCarthy, on June 23, 1945, issued a Proclamation No. 54, dated Asmara, June 23, 1945, which contained the following provisions:

“ WHEREAS it is necessary to make provision for the
“ arrest and detention of suspected persons,

“ NOW THEREFORE I, Charles D’Arcy McCarthy,
“ Officer of the Most Excellent Order of the British Empire,
“ Brigadier, hereby proclaim as follows :

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" 1. ARREST AND DETENTION OF PERSON ON SECURITY
" GROUNDS.

" The Chief Administrator may order the arrest and deten-
" tion of any person whom he has reasonable cause to believe
" to be or to have recently been concerned either inside or
" outside the occupied territory in acts prejudicial to public
" safety or to the interests and safety of any of the British
" or Allied Armed Forces, or in the preparation or instigation
" of such acts.

" 2. DETENTION OF PERSONS TRANSFERRED FROM ANOTHER
" TERRITORY.

" Where any person has been ordered to be detained or
" deported by the authorities of any British Colony or Pro-
" tectorate or of any territory in respect of which a mandate
" on behalf of the League of Nations has been accepted by
" His Britannic Majesty or of any other territory occupied
" by the British or Allied Armed Forces and has by order of a
" competent authority been transferred to the occupied
" territory, the Chief Administrator may order his detention
" after arrival in the occupied territory.

" 3. POWER TO CANCEL OR SUSPEND ORDER OF ARREST OR
" DETENTION.

" The Chief Administrator may at any time cancel any
" order made hereunder or may direct that the operation of
" such order be suspended subject to such conditions as he
" may think fit.

" Given under my hand at Asmara,

" this 23rd day of June, 1945.

" (Sgd) C. D. McCARTHY,

" Brigadier,

" Chief Administrator."

The Crown contends that this law, acted on with specific reference to Eliezer by an order of the Eritrean Military Government, dated October 4, 1945, made under the provisions of Proclamation No. 54, shows that the detention in Eritrea was legitimate according to the law of the place of detention: that the court in Palestine had no evidence before them to the contrary: that the law itself was so far as the courts in Palestine were concerned a foreign law: and that those courts had no jurisdiction to adjudicate on the validity of acts done under a foreign law in a foreign country or to order the release of persons detained in a foreign country.

The petition filed in the court of Palestine by the father of

Eliezer was dated September 4, 1945. It named as respondents (1.) the General Officer Commanding, Palestine, representing the Commander-in-Chief, Middle East ; (2.) the Inspector-General of Police and Prisons. It recited the facts of Eliezer's arrest by the police authorities under Reg. 15B of 1936, his removal from Palestine and his detention in a detention camp in Eritrea and later in the Sudan, and concluded as follows : " 6. On the " 23rd July, 1945, a reply was sent by the Acting Chief Secretary " of the Government of Palestine to Messrs. M. Seligman and " Co., a copy of which as well as of the enclosures mentioned " therein is also attached hereto and marked ' B.' 7. It is " respectfully submitted that petitioner's said son is being " unlawfully detained by respondents or one of them as they " had no power to detain abroad and/or keep in custody abroad " and/or order to be kept in custody abroad persons who " have been ordered to leave and remain out of Palestine."

There was no evidence before the court which would justify the allegation that Eliezer was being detained by the respondents or one of them. At the date when the petition was filed he had been brought back to Eritrea, and the fact of his temporary detention in the Sudan could not be, and has not been treated as, material in habeas corpus proceedings which were not begun until after its termination. On the petition coming before the court in Palestine, it was ordered that a summons should issue directed to the respondents calling on them to show cause why they should not produce Eliezer before the court and to await further orders from the court. It is true that the order of deportation already quoted ordered that the deported man should be placed in the custody of the Commander-in-Chief, Middle East, and of the second respondent while awaiting deportation and while being conveyed out of Palestine, but that period had long since expired at the date of the petition, and when the court made the order neither respondent had the deportee in his custody or control nor had either of them any power to produce the body. The Commander-in-Chief, Middle East, was not within the jurisdiction of the Palestine court, his headquarters being then at Cairo, nor could the General-Officer Commanding Palestine be deemed to represent the Commander-in-Chief so as to make him a respondent.

In these circumstances affidavits in opposition to the granting of the petition were filed, one by the Acting Assistant

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Superintendent of Police, Palestine, who set out true copies of the orders already quoted herein under the Emergency and Defence Regulations and deposed that in accordance with these orders Eliezer was on October 19, 1944, deported from Palestine and was at the time in Eritrea, held in detention by virtue of an order of the Chief Administrator of that territory. In addition, Major Wickstead, an officer of Security Intelligence, produced a copy of the Eritrean Declaration already referred to and deposed that he found on examination of the records relating to persons in respect of whom orders of detention had been made in Eritrea that Eliezer was under detention there by virtue of an order made on October 4, 1945, by the Chief Administrator of Eritrea under Proclamation No. 54. When the former deponent was cross-examined on behalf of the petitioner he deposed that Eliezer had been kept in Palestine in detention from October to November, 1944, that he was then removed by the military authorities to Eritrea, that some detainees had been released and returned to Palestine and that Eliezer's case had been examined from time to time by an Advisory Committee set up by the Government of Palestine. Major Wickstead was also cross-examined and said that his headquarters were in Cairo, that he had seen the committing document of Eritrea in his capacity as already deposed to, and he swore that the document of October 4, 1945, was an order of detention signed by the Chief Administrator of Eritrea.

On December 18, 1945, after hearing the arguments and discussing the evidence, the High Court, the Chief Justice of Palestine and Shaw J. sitting as its members, emphasized the grave questions of constitutional importance involved and observed that it was of as serious concern to the High Court of Palestine that a Palestine citizen should be exposed to summary arrest, transported to Eritrea and imprisoned there without any conviction or order of a court of justice as a similar case *mutatis mutandis* would have been in England, and said that the Palestine court would be no less assiduous in insisting that the Executive should establish step by step legal justification for the arrest than the English court. The court went on to say that neither the legality of the orders quoted above of arrest and deportation nor the legality of the order to the respondents to convey Eliezer to Eritrea, and keep him in custody while being so conveyed was questioned. As to the detention in Eritrea, the Chief Justice declared that no order of the Palestine Government could justify the detention of a

Palestine subject in a foreign country and cited *O'Brien's* case (1) as his authority. But in his view that case was distinguishable from the present one in as much as Eliezer was not being detained by the Palestinian authorities. His words were (2): "I have no doubt that if we, in this court, "were satisfied, as the judges were in the *O'Brien* case (1), "that the person who made the order of deportation, in this "case the Officer Administering the Government, had no power "to make the order, and if, again, as in the *O'Brien* case (1), "no authority in the country to which he had been deported "had made an order of detention, we would not accept that "part of the argument of the Solicitor-General which sought to "establish that as Arie Ben Eliezer had passed out of the control "of the respondents no rule should issue against them. I for "one would have followed precedent in the *O'Brien* case (1) "and made the rule absolute, merely for the purpose of testing "the truth of the matter, because, as I have indicated, I am "persuaded that the Palestine authorities can exercise far more "effective control over the movement of Arie Ben Eliezer than "Dr. Barnado could over the movements of Harry Gossage "in the case of *Barnardo v. Ford* (3)) or than the Home Secretary could in the case of *O'Brien* (1). But here the further "question as to whether the body could be produced does not "arise because I am unable to resist the conclusion that the "orders made by the Officer Administering the Government, "which were effective to deprive this man of his liberty up to "the borders of the territory of Eritrea, were lawfully made. "It appears to me also that the order of detention made by the "Chief Administrator in Eritrea was lawfully made, but as to "this I make no judicial pronouncement because neither the "Chief Administrator nor the territory of Eritrea is within the "jurisdiction of this court, and no writ of habeas corpus could "issue out of Palestine by authority of any judge or court here "into Eritrea. If the petitioner wishes to question the validity "of this order he must do so in the courts of Eritrea. The rule "is therefore discharged." Shaw J. concurred for similar reasons.

Their Lordships have approached the questions at issue here with the greatest anxiety, because the freedom of a Palestinian citizen is involved. The difficulties always present in such cases of detention without trial under emergency powers are,

(1) [1923] 2 K. B. 361.

(3) [1892] A. C. 326.

(2) (1945) 12 P. L. R. 559.

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they may here repeat, increased in the case under review where the detention complained of takes place in a territory outside and independent of the country whose courts are invoked. The Palestine court has accepted the legality of the orders of deportation, which are clearly within the competence of the Palestine Government. While the deportation order stands and its legality is not overruled its effect is that Eliezer is required to leave and remain thereafter out of Palestine. Such an order is not ultra vires of a limited territorial power like Palestine, nor are the further or ancillary powers of providing a place to which the deportee may proceed (see *Attorney-General for Canada v. Cain* (1), recently followed and applied by this Board in *The Co-operative Committee on Japanese Canadians v. The Attorney-General of Canada* (2). The order, indeed, so long as it remains in force renders it unlawful for Eliezer to seek to enter Palestine, and no court in Palestine has authority to require his production in that country in defiance of an order lawfully made by its responsible government. In legal strictness the Palestine Government is not concerned beyond the express terms of the order with events in Eritrea. What was to be done there was left to be dealt with by the law of that country, and the complaint can only be that the detention in Eritrea is not lawful. The law of Eritrea justifying according to its terms the detention has been produced and the order specifically detaining Eliezer has been sworn to in affidavit and orally in cross-examination under oath by an official who gives the source of his information. The actual order has not been produced, but there does not appear any reason why, in a proceeding like the present, effect should not be given to the sworn testimony of the responsible deponent. In these circumstances, the Palestine court has no jurisdiction to inquire into the legality of an order made by the responsible governing authority in Eritrea, under which Eliezer is detained in that country and in any case has no ground for questioning that order.

Counsel for the appellant has felt the difficulty which this aspect of the case presents. But he has sought to overcome it by a reliance on the decision of the Court of Appeal in *Rex v. Secretary of State for Home Affairs. Ex Parte O'Brien* (3). That authority was relied on for two purposes (1.) to support an argument that on the facts of the present case the Palestine

(1) [1906] A. C. 542.

(2) Ante p. 87.

(3) [1923] 2 K. B. 361.

Government could properly be ordered to produce the body, and (2.), that the proper order was not to discharge the order nisi but to make an order nisi which would enable the court, without deciding the question whether the Palestine Government had control of Eliezer, to clear up any doubts there might be as to the facts. In their Lordships' view, however, *O'Brien's* case (1) does not, when carefully considered, afford any help in this appeal. The central feature in that case was that there never was an effective legal order. The order relied on was made by the English Secretary of State for internment of O'Brien in the Irish Free State after the setting up of an Irish constitution and an Irish Executive. The Court of Appeal held that the order was illegal. Scrutton L.J., who at p. 391 gave as one reason for his opinion that there was never any power to order internment in a place over which the government or person issuing the order had no control, thus summed up his conclusion (2): "It may be that on hearing that in the "opinion of this court the order was issued without legal "authority, the Home Secretary, with the assistance of the "Irish Free State Government, will produce the body, as it is "hardly in the interests of either Government to act illegally. "For these reasons I think that the rule should be made "absolute for the writ to issue on the terms of the decree nisi." The other Lords Justices gave judgment to the same effect. The Secretary of State thereupon produced the body of O'Brien, giving as their justification, the order of internment which the court had held to be bad; the court made the order absolute and O'Brien was released. The Secretary of State sought to appeal to the House of Lords. It was not contended that an order of release could be the subject of a further appeal, but it was argued that the order in question did not direct O'Brien's discharge and hence might be appealed against. The House of Lords refused to draw this distinction and said that the actual order had determined the illegality of the applicant's detention and his right to liberty and was final though it did not direct his discharge. Accordingly it was held that no appeal lay. The House distinguished *Barnardo v. Ford* (3) as being a case of a different type not involving the question whether a person in prison ought to be set at liberty, but the entirely different question, which of several persons ought to have custody of a child. Lord Finlay said (4): "The matter was really disposed

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(1) [1923] 2 K. B. 361.

(2) *Ibid.* 392-3.

(3) [1892] A. C. 326.

(4) [1923] A. C. 618.

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" of in the present case when the Court of Appeal delivered judgment to the effect that the order of internment was invalid. O'Brien was entitled to his discharge and a custody which the court had declared to be illegal could not properly be continued at any time beyond that which was necessary for carrying through the formal proceedings culminating in the order for discharge." Lord Birkenhead to the same effect said that " if upon the return of the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody " (1).

In the present case the Palestinian court has found itself unable to say that the detention was illegal. They have said that it was beyond their competence to decide on the illegality of the detention in Eritrea. Their Lordships, as they have indicated, agree with this view but offer no opinion as to the further suggestion of that court, that, if the petitioner wishes to question the validity of the order made in Eritrea, he must do so in the courts of Eritrea. The validity and effect of the Eritrean law and order may raise many difficult questions of constitutional or other law. The legality of acts done, or of detention enforced in, that country in pursuance or assumed pursuance of its law or orders is, however, clearly beyond the jurisdiction of the Palestine court and of this Board on appeal.

In their Lordships' opinion the judgment appealed from was right in dismissing the petition. On the issue whether the petitioner's son can be deemed to be detained in Eritrea by authority of the Palestinian Government it is clear that the whole position is different from that in *O'Brien's* case (2). The Palestinian Government could not legally make an order for detention in Eritrea, nor could the Eritrean Government justify detaining a man in their territory on the ground that it was done at the request of the Palestinian Government. Indeed, it is not contended that they could. What is asserted, is that the detention is exercised under the lawful authority of the Eritrean Administration and the legality of the detention must be judged by the law of the place of detention. In any case, *O'Brien's* case (2) is so different in its facts and its real ratio decidendi that it can afford no precedent for this case.

Their Lordships have abstained from expressing any opinion about what was done in Eritrea or in the Sudan. These matters are outside the competence of the Palestinian court and therefore of this Board, which is only a Court of Appeal to determine

(1) [1923] A. C. 610.

(2) Ibid. 603.

whether the respondents or either of them have acted contrary to Palestinian law. Their Lordships would only add that certain preliminary objections taken in the court in Palestine were properly overruled.

They have accordingly, for the reasons they have stated, humbly advised His Majesty that the appeal should be dismissed.

Solicitors for appellant : *Kaufman & Co.*

Solicitors for respondents : *Burchells.*

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[HOUSE OF LORDS.]

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MORRISON STEAMSHIP COMPANY
LIMITED

APPELLANTS ;

1946

AND

GREYSTOKE CASTLE (CARGO
OWNERS).

RESPONDENTS.

May 28, 29,
30, 31 ;
June 3, 4, 5 ;
Nov. 22.

Shipping—General average—Cargo owners' contribution—Right to recover from ship in fault in collision—Remoteness.

Two ships having been in collision, one being, as was afterwards held, one-fourth to blame and the other three-fourths to blame, the latter had to put into port for repairs and there discharge and re-load her cargo, whereby a general average expenditure was incurred. The cargo owners, who became liable to their ship-owners for general average contribution, brought an action against the owners of the colliding ship, claiming (inter alia) one-fourth of this contribution :—

Held (per Lord Roche, Lord Porter and Lord Uthwatt, Viscount Simon and Lord Simonds dissenting) that the cargo owners had a direct claim against the owners of the colliding ship, for a proportion of the general average contribution, on the ground that their obligation was to share in that expenditure ab initio, even though that responsibility might be divested or diminished by the subsequent chances of the voyage, and was not merely an obligation to contribute by way of indemnity towards the expenditure of the owners of the cargo-carrying ship ; the cargo owners, being thus under a primary liability for their share of the expenses, had a direct claim against the appellants, not a derivative claim by way of subrogation.

The Marpessa [1891] P. 403 disapproved.

The Sucarseco (1935) 51 Ll. L. Rep. 238 considered and applied.

Decision of the Court of Appeal (sub. nom. *The Cheldale*) [1945] P. 10, affirmed.

**Present* : VISCOUNT SIMON, LORD ROCHE, LORD PORTER, LORD SIMONDS and LORD UTHWATT.

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X

H. L. (E.) APPEAL from the Court of Appeal (Scott, MacKinnon and du Parc L.JJ.).

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The facts, stated by Lord Porter and Lord Simonds, were as follows: The appellants were the owners of the steamship *Cheldale*. The respondents were owners of cargo laden on board the steamship *Greystoke Castle* which, when on voyage from Japan and Far Eastern ports to New York via Capetown was in collision on February 17, 1940, with the *Cheldale*. The *Cheldale* sank and there was some loss of life. The *Greystoke Castle*, as a general average act, put into Durban as a port of refuge in order to affect repairs and so as to be able to complete her voyage, arriving there on the day after the collision. There some cargo was discharged in order that she might be dry docked and repaired and she was detained in so discharging, repairing and re-loading until March 25, 1940, having incurred general average expenditure amounting to \$33,127.27. She then proceeded to New York, arriving on April 19 and later finished her discharge at Baltimore by May 2. The bills of lading, under which her cargo was being carried, followed the provisions of the Carriage of Goods by Sea Act, 1924; they contained the clause exempting the ship from liability for the master's negligence and also the following clause: "General average shall be payable according to York/Antwerp Rules, 1924, and as to matters not therein provided for according to the usages of the Port of New York." Admittedly these rules imposed a liability to contribute in general average which differed somewhat from that which would have been imposed without them and r. D provided: "Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure." The owners of the *Greystoke Castle* were, therefore, entitled to contribution from the respondents in respect of the general average expenditure incurred at Durban and on November 29, 1941, a general average statement and adjustment was prepared by average adjusters in New York (admittedly the proper place of adjustment) which showed that the proportion of that expenditure recoverable from cargo was \$22,802.05. Meanwhile, on February 23, 1940, the appellants started proceedings, on behalf of themselves, the master and crew, against the *Greystoke Castle*. Her owners counterclaimed for her damage. In these proceedings Langton J. on November 27, 1940, held both vessels to blame, the *Grevstoke*

Castle as to three-quarters and the *Cheldale* as to one-quarter. Thereupon, on February 7, 1941, the owners of the *Greystoke Castle* started a limitation action. On April 7, 1941, Langton J. decreed that they were entitled to limit their liability. On April 8, 1941, they paid into court the whole amount of their 8*l.* a ton liability, amounting to 45,956*l.* 16*s.* 10*d.* with interest. On July 24, 1941, the respondents, as cargo owners, commenced the present action against the appellants, claiming (1.) the amount of damage sustained by the cargo and (2.) the amount contributed by them in general average. On August 1, 1941, the appellants admitted liability for one-quarter of their claim, subject to a reference to the registrar to assess the amount. In their counterclaim in the collision action and subsequently as part of their claim in the limitation action, the owners of the *Greystoke Castle* claimed 19,001*l.* 18*s.* 0*d.*, a sum which included the whole of the damage, disbursements and port of refuge expenses due to the collision; it included the amount which under the general average adjustment, they were entitled to recover from the cargo owners. On May 22, 1942, it was agreed between the owners of the vessels that the sum should be reduced to 18,061*l.* 3*s.* 3*d.* and that the appellants' liability was one-quarter thereof, namely, 4,515*l.* 5*s.* 10*d.* Meanwhile, the cargo owners on February 16, 1942, paid their contribution towards the general average expenditure of the *Greystoke Castle* and followed this payment up by a detailed claim on September 29, 1942, in the present action for loss and damage to cargo and reimbursement of the sums paid as general average contribution. On June 8, 1943, the registrar dealt with the claims against this limitation fund as follows:

	£	s.	d.
(1.) Claim of the <i>Cheldale</i> her master and crew (three-quarters of gross claim)	49,265	13	3
Less claim of <i>Greystoke Castle</i> as above (i.e., one-quarter of 18,061 <i>l.</i> 3 <i>s.</i> 3 <i>d.</i>)	4,515	5	10
	44,750	7	5
(2.) <i>Cheldale</i> Cargo (United Africa Company)	146,090	4	8
(3.) <i>Cheldale</i> Cargo (G. B. Olivant)	12,713	5	1
	203,553	17	2
	3	X	2

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The assessment was never confirmed by the court, but on this basis the limitation fund, which had increased by the addition of interest to 47,668*l.* 6*s.* 0*d.*, was subsequently allocated as follows :

	£	s.	d.
(1.) <i>Cheldale</i> (net claims)	10,479	13	1
(2.) <i>Cheldale</i> Cargo (United Africa Company)	34,211	9	1
(3.) <i>Cheldale</i> Cargo (G. B. Olivant) ..	2,977	3	10
	47,668	6	0

On June 9, 1943, the respondents put in a fuller and amended claim in the present action amounting to 8,827*l.* 5*s.* 11*d.* for direct loss of or damage to cargo and 4,654*l.* 19*s.* 9*d.* for general average contribution and claimed to be entitled to recover one-quarter of each of these two sums. Admittedly the wrongdoing ship (the *Cheldale*) was directly liable to the owners of cargo lost or damaged as a result of a collision with the carrying ship (the *Greystoke Castle*): the former claim having, accordingly, been satisfied, no question arose as to it. The present dispute was as to the right of the owners of cargo laden in the *Greystoke Castle*, the respondents, to recover their general average contribution to that ship from the owners of the *Cheldale*, the appellants. On January 25, 1944, the registrar reported that on principle the respondents were entitled to recover from the appellants the sums which they had paid to the owners of the *Greystoke Castle* as contribution in general average, but gave liberty to either party to apply for a further hearing in order to have it determined whether any and, if so, which of the items included in the claim were recoverable under the ruling. This report was confirmed by the judgment of Lord Merriman P. on May 19, 1944. The respondents (the plaintiffs in those proceedings) were not the whole of the cargo owners concerned, the rest having made no claim against the appellants. After Lord Merriman P. had delivered judgment the figures of the respondents' claim were agreed between the parties at 3,134*l.* 3*s.* 6*d.*, viz., 25 per cent. of 12,536*l.* 14*s.* 2*d.*, but this sum included the damage to cargo about which there was no dispute. The actual amount at issue was 1,163*l.* 14*s.* 11*d.* As a result of this judgment, it was agreed between the appellants' solicitors and the solicitors for the *Cheldale's* cargo that the sums payable to the *Cheldale* would be increased by 146*l.* 1*s.* 2*d.* and the cargo interest reduced correspondingly.

This adjustment was made and the limitation fund was paid out on August 1, 1944. The figures between the respective shipowners having been reduced in order to give effect to the judgment, there was no question of the appellants being required to pay twice by reason of the assertion of rival claims on them for the same amounts. From the judgment of Lord Merriman P. an appeal was taken to the Court of Appeal and dismissed. The appellants appealed to the House of Lords.

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Sir William McNair K.C. and *Ashton Roskill* for the appellants. The question in this case is: Can cargo owners recover against the colliding ship the general average contribution to the carrying ship in respect of the port of refuge expenses? This question was determined in favour of the appellants in *The Marpessa* (1), which was rightly decided and should not be overruled. In that case the carrying ship sought to recover as damages from the wrongdoing ship the balance of general average contribution due from ship and freight to cargo, and the claim failed. In accordance with that decision, general average contribution is too remote to be recoverable as damages, for the wrongdoing ship had no part in creating the relation between the injured ship and her cargo nor in the liability thereby incurred. That case is in the appellants' favour: see also *Bradburn v. Great Western Ry. Co.* (2) and *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways Company of London, Ltd.* (3), which explains it. *The Marpessa* (1) is accepted as good law by text-book writers: see Roscoe's *Measure of Damages in Maritime Collisions*, 3rd ed., p. 18; Roscoe's *Admiralty Practice*, 5th ed., pp. 95, 365; Williams and Bruce's *Admiralty Practice*, 3rd ed., p. 118. *The Toward* (4) and *The Minnetonka* (5) present difficulties but the latter, which was a decision of the Court of Appeal, did not purport to overrule *The Marpessa* (1) and turned on a pure question of fact, whether the compromise was a reasonable mitigation of the damages which would otherwise be recoverable against the ship; there was no question as to general average contribution. The position of the appellants in the present case is stronger than that of the defendants in *The Marpessa* (1) because in that case the ordinary law of the

(1) [1891] P. 403.

(2) (1874) L. R. 10 Ex. 1.

(3) [1912] A. C. 673, 690.

(4) *Shipping Gazette*, May 8, 1899.

(5) [1904] P. 202; [1905] P. 206.

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sea applied, while in the present case there is a special contract to which the appellants were not parties and by the terms of which they were not affected. The owners of the *Greystoke Castle* could not have recovered general average contribution from the cargo owners at common law. They can only recover it because the bills of lading contain a clause incorporating the York/Antwerp Rules and exempting them from liability for the master's negligence: see *Strang, Steel & Co. v. A. Scott & Co.* (1). Thus this expenditure by the respondents is not traceable directly to the collision. The damage was too remote and is not recoverable at law; it was not caused by any wrongful act on the part of the appellants. The owners of the *Greystoke Castle* incurred the expenses of necessity in order to earn their freight under the contract of affreightment and in no other capacity. So far as the appellants are concerned, the liability or damage arose from a contract with a third party. Accordingly, it did not give rise to any claim for damages by the respondents against the appellants, since there was no physical injury to their property, the cargo. Whether by land or sea such physical damage is necessary to support an action in a case like the present: *Société Anonyme de Remorquage à Hélice v. Bennetts* (2); *Chargeurs Réunis Compagnie Française de Navigation à Vapeur v. English & American Shipping Co.* (3); *The Okehampton* (4). The basis of these cases is the observations of Lord Penzance in *Simpson & Co. v. Thomson* (5). There was no damage to the respondents' goods and only a liability arising out of contract. Damage by negligence to a chose in action gives no cause of action. The respondents are in a position similar to that of underwriters: see *Burton & Co. v. English & Co.* (6); *The Gratitude* (7). They can only stand in the place of the ship which incurred the expenditure and, having paid the amount of the contribution, they would be entitled to call on the shipowners to proceed against the wrongdoing ship. If a shipowner succeeds in recovering from a wrongdoing ship he holds the amount recovered as an accounting party for himself and his contributories: see *Castellain v. Preston* (8).

(1) (1889) 14 App. Cas. 601, 609.

(6) (1883) 12 Q. B. D. 218,

(2) [1911] 1 K. B. 243, 248.

223.

(3) (1921) 9 Ll. L. Rep. 90,

(7) (1801) 3 Ch. Rob. 240, 256,

464.

257, 261.

(4) [1913] P. 173.

(8) (1883) 11 Q. B. D. 380, 385.

(5) (1877) 3 App. Cas. 279,

289.

But if both the carrying ship and the wrongdoing ship are in the same ownership the contributories have no rights against anyone; that follows from the special sort of contract into which they have entered. The appellants had no defence to the claim of the owners of the *Greystoke Castle* for one-quarter of the disbursements made by them at Durban and have in fact paid them the amount of their liability. Where two parties are entitled to sue for the same damage and the shipowner has obtained judgment for the damage to his ship, including his general average expenditure, from the wrongdoing ship, and that damage has been paid or set off against sums which his own vessel owes to the wrongdoing ship, then the owners of the wrongdoing ship may claim that, on the principles stated in *The Winkfield* (1), their liabilities were discharged: see Salmond on the Law of Torts, 10th ed., p. 307. The case of *The Sucarseco* (2) in the Supreme Court of the United States of America is against the appellants' contention but it does not correctly represent the law of England. The argument based upon the desirability of uniformity should not prevail since the law of the United States differs from the law of England in important respects in the matter of liability in maritime collisions: see *Gosse Millard v. Canadian Government Merchant Marine, Ltd.* (3). [They also referred to *Vlassopoulos v. British & Foreign Marine Insurance Co.* (4); *Svendsen v. Wallace* (5) and *Chellew v. Royal Commission on the Sugar Supply* (6).] *The Marpessa* (7) was rightly decided. It established a convenient and business-like practice and it ought not to be overruled now after its principle has been accepted for so long a time. It is well understood and it works satisfactorily and it applies only in a limited field. [They referred to *Louis Dreyfus & Co. v. Tempus Shipping Co.* (8); *Admiralty Commissioners v. Valverde (Owners)*, (9) and *In re Warden & Hotchkiss Ltd.* (10).] Consequently the respondents' claim must fail, since, in respect of port of refuge expenses, they have only to deal with the owners of the *Greystoke Castle*, and general average contribution paid by cargo to carrying ship is never recoverable by the cargo owners directly from the colliding ship.

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(1) [1902] P. 42.

(2) (1935) 51 Ll. L. Rep. 238.

(3) [1928] 1 K. B. 717, 732.

(4) [1929] 1 K. B. 187.

(5) (1885) 10 App. Cas. 404.

(6) [1921] 2 K. B. 627, 636;

[1922] 1 K. B. 12.

(7) [1891] P. 403.

(8) [1931] A. C. 726, 749.

(9) [1938] A. C. 173, 194.

(10) [1945] Ch. 270.

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Sir Robert Aske K.C. and *Arthur Hodgson* for the respondents. The accident was contributed to by the appellants' negligence and the respondents' cargo was thereby put in jeopardy. Through this negligence the respondents sustained damage (inter alia) to the extent of the general average contributions. If the cargo had been lost the appellants would have had to pay damages but the owners of the carrying ship had to take all reasonable steps to minimize the loss and this they did, taking their ship to a port of refuge. This involved expenditure which was distributed among the ship, the cargo and the freight and contribution by the cargo was inescapable. In the chain of events nothing was extraordinary and this expenditure fell on the cargo naturally and in the ordinary course of events. The matter comes precisely within the principle *restitutio in integrum*. The respondents have a direct remedy against the appellants and can recover from them directly in respect of their general average contribution, because in such circumstances as these the owner of the carrying ship incurs this expenditure as agent for the cargo owners. This is the recognized practice: see *Liesbosch (Owners) v. Edison (Owners)* (1). If the appellants' argument were correct and the respondents could not recover direct from them under the principles laid down in *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (2), the sum which could be effectively recovered from them in respect of port of refuge expenses would be less than a quarter of the amount paid by the respondents in general average by more than 1,000*l.* and the cargo owners would be left without a remedy against anyone. [They referred to *Tate & Lyle, Ltd. v. Hain Steamship Co., Ltd.* (3); *Noreuro Traders, Ltd. v. F. Hardy & Co.* (4); *The Gratitude* (5) and *Burton & Co. v. English & Co.* (6).] The Supreme Court of the United States of America correctly stated the law in *The Sucarseco* (7). Following English decisions, it came to the conclusion for which the respondents contend. Moreover, it is desirable, if possible, to avoid a divergence between the maritime law of the two countries. In the United States *The Marpessa* (8) was not followed. It was wrongly decided and has not been recognized as an authority. The

(1) [1933] A. C. 449, 462.

(5) 3 Ch. Rob. 240, 257.

(2) (1882) 7 App. Cas. 795.

(6) 12 Q. B. D. 218, 223.

(3) (1934) 151 L. T. 249;

(7) 51 Ll. L. Rep. 238.

(1936) 155 L. T. 177.

(8) [1891] P. 403.

(4) (1923) 16 Ll. L. Rep. 319.

ground of its decision was that general average contribution is not damage caused by the collision but arises from the relationship of cargo to ship, the arrangements made inter se between cargo and ship; that is said to be the immediate cause of the loss. But general average contribution is not based on contract at all. Apart from the observations in *Wright v. Marwood* (1), it is laid down in all the other authorities that it arises from the law of the sea and that is now generally accepted; see Lowndes on the Law of General Average (6th ed.), p. 29: *Aitcheson v. Lohre* (2) and *Tate & Lyle, Ltd. v. Hain Steamship Co., Ltd.* (3), where the court adopted the observations of Lord Esher M.R. in *Burton & Co. v. English & Co.* (4) and of Lord Watson in *Strang, Steel & Co. v. A. Scott & Co.* (5). The basis of *The Marpessa* (6) is wrong because the general average obligation does not arise out of contract at all: see *Tindall v. Bell* (7). It arises out of the joint adventure of ship and cargo subjected to a common danger and damaged by the negligence of the wrongdoing ship; the contribution arises from the necessity of escaping from the danger. If an innocent ship damaged by collision needs salvage assistance, the payment to the salvors is recoverable against the wrongdoing ship: see *The Legatus* (8); *Aitcheson v. Lohre* (9); Roscoe's Measure of Damages in Maritime Collisions (3rd ed.), p. 59 and Arnould on Marine Insurance (12th ed.), p. 1158. There is an analogy between salvage and general average contribution in this connexion. The whole problem ultimately resolves itself into the question whether the loss sustained by the respondents by reason of the payment of contribution flowed naturally in the course of things from the appellants' wrongful act. The true basis of the law is set out in *The Minnetonka* (10) which on principle is the same as the present case and is not reconcilable with *The Marpessa* (6): see *Société Anonyme de Remorquage à Hélice v. Bennetts* (11). The fact that in *The Minnetonka* (10) there was no actual damage to the cargo made no difference. That case and *The Toward* (12) are direct authorities in favour of the respondents. Further, a decision in favour of the appellants would be inconsistent with *Gracie*

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(1) (1881) 7 Q. B. D. 62, 67.

(8) (1856) Swab. 168.

(2) (1879) 4 App. Cas. 755, 760.

(9) (1879) 4 App. Cas. 755, 765.

(3) 151 L. T. 249, 256.

(10) [1905] P. 206.

(4) 12 Q. B. D. 218.

(11) [1911] 1 K. B. 243.

(5) 14 App. Cas. 601.

(12) Shipping Gazette, May 8, 1899.

(6) [1891] P. 403.

(7) (1843) 11 M. & W. 228, 229.

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(*Owners*) v. *Argentino* (*Owners*). (*The Argentino*) (1). The respondents have a direct claim because they incur a direct liability. The master of the ship is in charge of all the interests and the various parties have to contribute if expense are incurred through him, as the common agent of all, for all. The cargo owners may incur direct liability through his acts. For example, the warehouseman storing the cargo has a lien for his charges and in the cases of sale of part of the cargo or hypothecation of the whole, the shipowner acts as agent for the cargo. Further, the negligence clause of the Hague Rules incorporated in the bills of lading (see the Carriage of Goods by Sea Act, 1924), does not break the chain of causation on which the liability of the appellants depends. The rules are now virtually of universal application and do not represent a special arrangement of the parties. By the Marine Insurance Act, 1906, s. 66, sub-s. 4 : "Subject to any "express provision in the policy, where the assured has "incurred a general average expenditure, he may recover from "the insurer in respect of the proportion of the loss which "falls upon him ; and in the case of general average sacrifice, "he may recover from the insurer in respect of the whole loss "without having enforced his right of contribution from other "parties liable to contribute" : see *The Mary Thomas* (2). The appellants relied on *Simpson & Co. v. Thomson* (3) but that is not in point because general average contribution has nothing to do with insurance. [They also referred to *The Argentino* (4) ; *Bradburn v. Great Western Ry. Co.* (5) ; the United States Carriage of Goods by Sea Act, 1936, s. 4 ; the Hague Rules, 1921 ; the York/Antwerp Rules, 1924 ; Scrutton on Charterparties (12th ed.), pp. 550, 564 and 575 ; Lowndes on The Law of General Average, pp. 295 and 734, and Carver on Carriage of Goods by Sea (8th ed.), p. 526.]

Sir William McNair K.C. in reply. The appellants rely on three propositions : (1.) Payment made by way of contribution in general average is a payment made under a contract of indemnity. On such payment being made, the indemnifier (i.e., the cargo owner) is entitled to call on the party indemnified (i.e., the shipowner) to claim against the tortfeasors but has no independent right of suit of his own any more than an underwriter has. In cases of jettison the master acts as agent

(1) 14 App. Cas. 519.

(2) [1894] P. 108, 117.

(3) 3 App. Cas. 279.

(4) (1888) 13 P. D. 191, 200.

(5) L. R. 10 Ex. 1.

of necessity for the owner of the cargo jettisoned, subject to an implied term that the cargo owner is entitled to indemnity ; so, where the master incurs expenditure, as in the present case it is subject to the same implied term as to indemnity. No principle of law is embodied in s. 66, sub-s. 4, of the Merchant Shipping Act, 1906. The respondents relied on *The Mary Thomas* (1) but their argument was that which was rejected in *Green Star Shipping Co., Ltd. v. London Assurance* (2). They also sought to draw an analogy between salvage and general average expenditure but there is the plainest distinction. (a) Salvage creates a direct and several liability in each of the persons interested in the salvaged property for salvage recovered. (b) The liability attaches immediately the salvaged property reaches a place of safety and is not dependent, as in general average, on the termination of the cargo carrying adventure : see Kennedy on *The Law of Civil Salvage* (3rd ed.), p. 234. (2.) Liability or damage arising from a contract with a third party gives no ground for a claim for damages in an action for negligence against a wrongdoer unless the liability or damage arose from physical injury to the plaintiff's person or to property owned by, or in the possession of the plaintiff : see *Simpson & Co. v. Thomson* (3) ; *Société Anonyme de Remorquage à Hélice v. Bennetts* (4) ; *Chargeurs Réunis Compagnie Française de Navigation à Vapeur v. English & American Shipping Co.* (5), and *The Okehampton* (6). *Tindall v. Bell* (7) has nothing to do with this case. As regards *The Minnetonka* (8), the making of the compromise avoided physical deterioration of the cargo, which would have given rise to a claim against the wrongdoer by the cargo owner. (3.) The damages claimed in this action are too remote (a) because they arose from a special contract with a third party which created a liability which is the basis of the respondents' claim and which created a liability to contribute in general average towards items which at common law would not be admissible in general average, e.g., re-loading expenses and insurance of general average disbursements ; (b) because liability is dependent on the happening of an event months after the acts were done, i.e., the safe arrival of the cargo : see *Gracie (Owners) v. Argentino (Owners)*. (*The Argentino*) (9) ; *Liesbosch (Owners) v. Edison (Owners)* (10) ; *Admiralty*

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(1) [1894] P. 108.

(2) [1933] 1 K. B. 378, 388.

(3) 3 App. Cas. 279

(4) [1911] 1 K. B. 243, 248.

(5) 9 Ll. L. Rep. 90, 464.

(6) [1913] P. 173, 178.

(7) 11 M. & W. 228.

(8) [1905] P. 206.

(9) 14 App. Cas. 519.

(10) [1933] A. C. 449, 463, 468.

H. L. (E.) *Commissioners v. Amerika (Owners) (1), and Strang, Steel & Co. v. A. Scott & Co. (2)*. The respondents relied on the universality of the York/Antwerp Rules, 1924, but the United States have not adopted them; they represent only one of many forms of bills of lading.

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THE HOUSE took time for consideration.

Nov. 22. VISCOUNT SIMON. My Lords, this appeal involves a difficult question of principle relating to general average expenditure—a question on which this House has not hitherto pronounced and on which previous decisions in the English courts appear to be in conflict. I have had the great advantage of reading and studying the opinions prepared by my four colleagues who sat with me to hear the appeal: these opinions, as will shortly transpire, are not unanimous, but three out of the four lead to the conclusion that the appeal should be dismissed and this, therefore, will be the decision of the House. My own reflections have led me to the minority view expressed by my noble and learned friend Lord Simonds, whose reasoning and conclusion I would adopt. Without seeking to duplicate the argument, I add these observations.

I understand that your Lordships are at one in rejecting the view of Scott L.J. that when the *Greystoke Castle* makes its claim to recover general average expenditure from the *Cheldale*, which is partly to blame for the collision, the *Greystoke Castle* can only recover the net sum arrived at by deducting the cargo owner's contribution. I agree with the rest of your Lordships in this view. This being so, it follows that if the respondents' contention is accepted there are two possible claimants against the *Cheldale* to recover the amount of the cargo owner's contribution. This, to say the least of it, may introduce complications. MacKinnon L.J. seeks to avoid these by saying that the two claims ought to be dealt with together, when the court will see to it that nothing is paid twice over and that the right claimant gets the money. But the claims are not necessarily heard at the same time—and were not in the present case. Indeed, it is quite possible that the two claims might be dealt with in different jurisdictions, for one of the claimants might serve process on the *Cheldale* when in a foreign port. It is not entirely clear to me how the competing claims would be handled even if they came before the same court, though no

(1) [1917] A. C. 38.

(2) 14 App. Cas. 601, 609.

doubt means of doing justice would be found. But it is further to be observed that if the respondents' view is right a claim brought by one of the claimants alone could not be wisely compromised without bringing the other claimants before the court; the court, one would suppose, ought to have all competing claimants before it. I venture also to think that some confusion may result from treating the cargo owner's direct claim in respect of his contribution to general average expenditure as analogous to his claim when his goods are damaged by negligence. In the latter case there is an invasion of his proprietary right, and questions of the claims of bailor and bailee may arise. In the former case neither ownership nor possession is involved, and the question is merely as to the means of getting back a money payment made to a third party. What I have said does not, of course, prove that the cargo owner cannot make a direct claim—for that I rely on and adopt Lord Simonds' argument—but it does go to indicate some of the considerations to be weighed before deciding that that argument is wrong.

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LORD ROCHE. My Lords, this appeal raises questions of some nicety and difficulty, but in spite of the admirable argument addressed to the House by Sir William McNair on behalf of the appellants I am of opinion that the result arrived at in the courts below is correct and that the appeal should be dismissed.

I omit any detailed account of the facts of this case, as they are so fully set out by my noble and learned friend Lord Porter, whose opinion I have had an opportunity of reading. There is, therefore, on the facts little that I need add or repeat. The claim of the respondents, owners of cargo laden on the *Greystoke Castle* is, so far as it is in dispute, a claim to be paid direct by the owners of the *Cheldale* (as having been held one-quarter to blame for the collision) one quarter of the amount they have paid in general average in respect of port of refuge expenses incurred by reason of the collision. The appellants contend that no such claim can be asserted by the respondents and that they have only to deal in respect of port of refuge expenses with the ship-owners who owned the *Greystoke Castle*.^{*} If that is correct, then, by reason of the rules governing cross liabilities laid down in *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co. (The Khedive)* (1), the sum to be

(1) 7 App. Cas. 795.

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effectively collected from the appellants under this head is less than the quarter aforementioned by over 1,000*l.* Except, however, as explaining why there is a dispute, this money difference is immaterial for the decision of the questions of principle involved.

One other fact may be stated in order to eliminate a topic considerably discussed in the courts below. The owners of the *Greystoke Castle* included in their claim the whole of the port of refuge expenses and there was an agreement with the appellants allowing this claim with certain adjustments. But meanwhile the respondents had both asserted their independent claim against the appellants and had in fact paid their share of the port of refuge expenses to their shipowners, the owners of the *Greystoke Castle*. Accordingly, after Lord Merriman P.'s judgment sustaining the respondents' claim, the figure agreed between the respective shipowners was reduced in order to give effect to the judgment and there is no question whatever of the appellants being required to pay twice by reason of the assertion of rival claims upon them for the same amounts. This leads me to mention and dispose of a question arising out of certain reasons assigned by Scott L.J. for his judgment somewhat severely restricting the right of shipowners to assert a claim in cases such as the present. I do not myself agree with those reasons or regard them as necessary to support a judgment in favour of the respondents. I cannot doubt that on the principles recognized in *The Winkfield* (1) the shipowner in a proper case can claim the whole of the port of refuge expenses on behalf of himself and of owners of cargo and freight. But equally I do not doubt that if he who has the general property, that is to say the cargo owner, has an independent right to claim and asserts that claim in competition with the shipowner's claim and asserts it in time, his claim must prevail. See the authorities discussed in Salmond on the Law of Torts, 10th ed., pp. 307-308.

I come now to the real matters of contention in the case. Before the registrar and the President the question debated seems to have been solely whether the decision in *The Marpessa* (2) was correct or alternatively was so venerable that it should be followed. That decision rests on reasons as to causation. In *The Marpessa* (3) the damages claimed were held to be due to what was described as "the relation of

(1) [1902] P. 42.

(3) Ibid. 409.

(2) [1891] P. 403.

" ship to cargo " and not to the collision. This reasoning is in my judgment erroneous. I should be content to adopt the judgment of the President in this case as expressing my reasons for this opinion. I agree with him also in thinking that the decision of the Court of Appeal in *The Minnetonka* (1) is inconsistent with *The Marpessa* (2). In my judgment the reasoning of the Court of Appeal in *The Minnetonka* (1) is right and that of Jeune J. in *The Marpessa* (2) is wrong. This matter is admirably put by Hughes C.J. in giving the judgment of the Supreme Court of the United States of America in *The Sucarseco* (3): " The nature of these expenditures " (general average) " and the fact that they are traceable directly " to the collision are not changed by the sharing in general " average. That merely effects the distribution of the loss, " not its cause." It was said for the appellants that the law of the United States of America as to general average was in some respects different from the law of England and this is no doubt true though the differences seem immaterial to anything which arises in the present action and as regards our present topic the decision under consideration was not concerned with the law of general average so much as with the laws of cause and effect and in that matter the reasoning of the Supreme Court is as valid in this jurisdiction as in its own. With regard to the contention that the principle of *The Marpessa* (2) was securely entrenched by reason of its date, no doubt it has been re-stated in text books and on occasion may have been followed but no decision approving it was cited and it was disregarded by the Court of Appeal in *The Minnetonka* (1) and quite clearly by Gorell Barnes J. in *The Toward* (4).

There remains for consideration the contention on behalf of the appellants that the respondents had no direct right of suit because it was said that : (a) their cargo sustained no material or physical damage and an expense occasioned to them after the collision in connexion with a contract was not actionable ; (b) they were really in the same position as underwriters and the doctrine of *Simpson & Co. v. Thompson* (5) negating the right of underwriters to any direct cause of action against a wrongdoer applied to the case of the respondents. As to reason (a) the latter branch of this contention appears to me to be largely a repetition of the argument based on *The*

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(1) [1905] P. 206.

(2) [1891] P. 403.

(3) 51 Ll. L. Rep. 238, 241.

(4) Shipping Gazette, May 8,
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(5) 3 App. Cas. 279.

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Marpessa (1) and the supposed remoteness of the expense as a result from the collision is a cause. As to the first branch of this contention, I would observe that in my judgment if the expense is occasioned by the collision and if it is the expense in whole or in part of the cargo owners—a matter to which I shall direct your Lordship's attention when dealing with contention (b)—if, I say, these things be so then no authority was cited to support the proposition that whether by land or by sea physical or material damage is necessary to support a cause of action in a case like this.⁴ I do not regard the case of *Société Anonyme de Remorquage à Hélice v. Bennetts* (2) which was cited as any such authority. If it was correctly decided, on which I express no opinion, I think it must depend on a view that one vessel (A) does not owe to the tug which is towing vessel (B) any duty not negligently to collide with (B). On the other hand,⁴ if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B and if lorry A is negligently driven and damages lorry B so severely that whilst no damage is done to the goods in it the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then in my judgment the goods owner has a direct cause of action to recover such expense. No authority to the contrary was cited and I know of none relating to land transport. As regards the sea, *The Minnetonka* (3), *The Toward* (4) and in the United States of America *The Sucarseco* (5) are authorities completely opposed to this contention of the appellants.

I have used above the phrase "If the expense is the expense of the cargo owners" and this hypothesis raises the central point in the appellants' contention. The contention rests on the proposition that a cargo owner is in a case like the present in no other or different category from that of an insurer and accordingly on the principle laid down in *Simpson & Co. v. Thomson* (6) cannot sue in his own right. An examination of

(1) [1891] P. 403.

(2) [1911] 1 K. B. 243.

(3) [1905] P. 206.

(4) Shipping Gazette, May 8, 1899.

(5) 51 Ll. L. Rep. 238, 241.

(6) 3 App. Cas. 279.

the history of general average and of the leading authorities on the subject in my judgment negative this contention and show that the cargo owner's obligation is from the occurrence of the general average act a direct obligation to share the expenses incurred by reason of the common danger and acts done to meet it. He is in my view a principal in the transaction—a neutral word which I use advertently for the time being. It is very necessary to bear in mind that undue attention to the question of how the money is raised to finance a transaction or whose credit is pledged to effect it may obscure the fact that although A may be the principal, and the sole principal, to a contract, he may nevertheless in and about the transaction carried out by means of such contract be an agent for B, C and D exclusively or for them jointly with himself. This position is illustrated in the well-known advice of Blackburn J. to this House in *Ireland v. Livingston* (1). When such a position arises, as in my opinion it arose in the present case, the agent has both the responsibilities of an agent and also his rights. Perhaps the most important of such rights is in due course to be put in funds by his principals who must pay to him the whole or their share of the expenses incurred on the common account.

Another contention put in the forefront of the argument for the appellants was that the shipowner incurred the expenses of necessity in order to earn his freight under the contract of affreightment and in no other capacity. An examination of the history of the matter and of the authorities, in my judgment, negatives this contention also and shows that the shipowner through the master has imposed upon him other and super-added duties causing him to act as agent for all the persons whose interests are endangered.

I pass to the authorities: Apart from text-books writers of authority such as Lowndes' *General Average* (6th ed.), pp. 19-29 and passim, the main authorities to be regarded are these: *The Gratitude* (2) is a rich mine of information on the history and law of general average. Lord Stowell (then Sir William Scott) heard the case. The *Gratitude* had put into a port of refuge, discharged cargo in order to execute repairs, and to pay the expenses the master borrowed money on a bottomry bond on ship, cargo and freight. It was contended that the master had not a right to hypothecate the cargo for repairs to the ship. The substance of the judgment of Sir William Scott is that the

(1) (1871) L. R. 5 H. L. 395, (2) 3 Ch. Rob. 240.
408, 409.

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master's duties are not limited to safe custody and conveyance but in cases of necessity the character of agent and super-cargo is forced upon him. For that reason the master may sacrifice cargo, may pledge it or sell it to raise funds, or may bind it in ransom. The reason assigned is that even repairs to ship may be done for the common benefit of both ship and cargo and the expense may therefore be met by borrowing on or selling cargo if that is the feasible and appropriate course. The whole gist of the judgment, as I see it, is that all those who benefit must share the expense of procuring the benefit, and that this principle holds, notwithstanding the variety in the methods of finance and in the nature of the contracts adopted and made to meet the expense incurred by reason of the general average act. *Birkley v. Presgrave* (1) contains the famous pronouncement of Lawrence J. : "All loss which arises in consequence of " extraordinary sacrifices made or expenses incurred for the " preservation of the ship and cargo comes within general " average, and must be borne proportionably by all who are " interested." The case decided that the defendants' proportion of a debt so incurred was recoverable from them at common law and not only in equity. In *Burton & Co. v. English & Co.* (2) Brett M.R. stated the position thus : " How does such " a claim " (for general average) " arise? In theory it arises " from an act done by the master of the ship, not as the servant " of the shipowner, but as the servant of the cargo owner," (it was a case of jettison) " a relation which is imposed upon " him by the necessity of the case." So also Bowen L.J. (3). The view of a judge very learned in the maritime law Gorell Barnes J. appears both in *The Toward* (4) and more at length in *The Mary Thomas* (5). In the latter case he says : " The " position is this, that the shipowner, on the one hand, has " his ship and freight at risk ; on the other hand, the cargo " owner has his cargo at risk ; and going back to the way in " which this matter is discussed in some of the old books, if " both of the parties were there at the time each responsible for " the difficulty in which they found themselves, that is to say, " each of them bearing the loss which would result from it, they " would naturally say, ' We must spend some money to get out " ' of this difficulty and that we must share in proportion to the

(1) (1801) 1 East 220, 238.

(2) 12 Q. B. D. 218, 220.

(3) Ibid. 223.

(4) Shipping Gazette, May 8, 1899.

(5) [1894] P. 108, 117.

“ benefit to be derived from it ’.” And again the learned judge says (1) : “ The operation of saving is taken for the benefit of “ both the ship and the cargo ; . . . and therefore the captain “ who at this time . . . acts as agent for the person whose “ property is at risk, spends the money on behalf of all who are “ interested, and all who are interested must contribute to it.” The conclusion in the case under decision was that underwriters on the ship were only liable for the shipowner’s share and not for the whole expenditure. In this judgment the Court of Appeal concurred. In *The Toward* (2) the learned judge had to deal with competing claims of the shipowner and of cargo owners who had paid to the shipowner general average expenses. The registrar, following *The Marpessa* (3) had disallowed the cargo owners’ claim. But the judge took the other view and said, “ If any of the moneys claimed by the shipowner “ against the wrongdoer are in respect of matters which *were* “ incurred on behalf of both parties and for which the shipowner. “ has been reimbursed by the cargo owners, his claim should be “ based on his real loss so that the cargo owners’ claim will also “ be based upon their real loss.”

The decision in *Hain Steamship Co., Ltd. v. Tate & Lyle, Ltd.* (4) disposes of various contentions raised by the appellants such as that liability for general average contribution only arises and a lien only attaches at the port of destination. In the Court of Appeal, Greer L.J. states the matter thus (5) : “ . . . the law has been frequently stated by judges and jurists “ of authority in commercial matters in words which lead me “ to conclude that both the liability and the lien come into “ existence as soon as the sacrifice has been made or the “ expenses have been incurred, but that the liability and the “ lien are subject to be defeated by the non-arrival of the cargo “ at the port of destination.” The question of lien is further dealt with later in the judgment (5) and the conclusion is reached that the lien has to be and is exercised not on behalf of the ship only but on behalf of all concerned who are entitled to be paid a contribution or share by others concerned in the venture and who are benefited by what was done or expended. These statements by Greer L.J. were expressly approved in your Lordships’ House : see per Lord Atkin (6).

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(1) [1894] P. 118.

(4) (1934) 151 L. T. 249 ;

(2) Shipping Gazette, May 8, (1936) 155 L. T. 177.

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(5) 151 L. T. 249, 256.

(3) [1891] P. 403.

(6) 155 L. T. 177, 180.

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Two observations may be made arising out of the above cases : (1.) That the principles of general average and their application have become so well established that all who engage in ventures on the sea must, as I think, be taken to contemplate their application as natural and indeed inevitable. (2.) That although general average is not a mystery it is a system with elements peculiar to itself derived and developed from very ancient sources and incorporated with its peculiarities into the maritime law of England and in my judgment it is a mistake to assume that it can be expected in all respect to conform to the rules which are applied to transactions on dry land.

There remains to consider the authority of the Supreme Court of the United States of America in *The Sucarseco* (1) which I have mentioned above in connexion with the first point in the present case. It arose upon facts closely resembling the facts in the present case. The Chief Justice thus continues the quotation set out by me above : "The claim of the cargo owners "for their general average contributions is not in any sense a "derivative claim. It accrues to the cargo owners in their own "right. It accrues because of cargo's own participation in the "common adventure and the action taken on behalf of cargo "and by its representative to avert a peril with which that "adventure was threatened. Being cargo's own share of the "expense incurred in the common interest the amount which "is paid properly belongs in the category of damage which the "cargo owners have suffered by reason of the collision "the right does not stand on subrogation." To meet the impact of this case it was again said that the law of the United States of America as to general average is not identical with the English law. That statement is true but unless the dissimilarities affect the present question, and of that I have seen no evidence, the potency of the argument in the judgment is quite undiminished. I believe the principles enunciated therein, including the recognition of a special relationship arising out of participation in a common adventure at sea, to be as correct in English as in American law and it is to be observed that the English cases, e.g., *The Gratitude* (2) and *Burton & Co. v. English & Co.* (3) were discussed and vouched as authorities for the conclusions arrived at.

Therefore, my conclusion is that the authorities establish the principle which I hold to be correct that the obligation of the

(1) 51 Ll. L. Rep. 238, 241.

(3) 12 Q. B. D. 218.

(2) 3 Ch. Rob. 240.

cargo owners is to share the expenses incurred in the general average act and that they are ab initio responsible for their proper share, though the responsibility may be divested or diminished by the subsequent chances of the voyage. The expenses accordingly are in due proportion their expenses and they are not in a position equivalent, or even analogous, to that of an insurer and the principle of subrogation has no application. For these reasons, my Lords, I am for dismissing the appeal, with costs.

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LORD PORTER. My Lords, this case raises three questions : (1.) Can innocent cargo owners ever recover from a wrongdoing ship owned by a third party the general average contribution which they have paid to the carrying ship ? (2.) Is such damage caused by or, to use the common phrase, does it flow from the tortious act of the wrongdoing ship ? (3.) Is it in any case too remote ? Obviously the principles to be applied in the case of questions (2.) and (3.) merge into one another, but the first question raises a different and more radical point.

My Lords, having regard to the facts established it was recognized both by Lord Merriman P. and by the Court of Appeal, that if *The Marpessa* (1) was rightly decided, the appellants in this House must succeed. That case was, however, considered by the Court of Appeal to be in conflict with the later decision in *The Minnetonka* (2) and is undoubtedly contrary to the decision in the United States in *The Sucarseco* (3). *The Minnetonka* (2) dealt with the question, what damage is caused by a tortious act and whether general average contribution is too remote to be recoverable, at the suit of those who have paid their quota, from a ship which by its negligence has occasioned the expenditure. In *The Sucarseco* (3) the same question was considered, but a further point was also discussed, viz. : whether those who contribute to general average expenditure have a direct or only a derivative claim against a ship which negligently collides with the carrying vessel—and the conclusion was reached that it was direct and not merely derivative.

Before your Lordships' House this more far-reaching question was fully argued, the appellants contending that general average contribution paid by cargo to carrying ship is never directly recoverable at the suit of the owners of cargo from a ship which has negligently collided with her, whilst the respondents main-

(1) [1891] P. 403.

(3) 51 Ll. L. Rep. 238.

(2) [1905] P. 206.

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tained that it could be so recovered. In order to answer this question it is agreed by both parties to the action that the complications introduced into the present case by the limitation of the *Greystoke's* liability may be disregarded and that the broad question to be decided is whether the injured ship acts for itself in incurring the general average expenditure and is alone responsible for payment, and, though it can recover a due proportion from the contributing interests, yet does so by way of indemnity on the same principle as that on which it would recover a loss from its insurers, or whether it acts throughout on behalf of the interests concerned so that they can sue the offending vessel for the contributions which they are legally compellable to make. Scott L.J. took the view that the ship's real loss was the general average expenditure to which she had been put less the amount which she had recovered by general average contribution and that she could recover no more from a wrong-doing vessel. He said (1): "It is only the real loss incurred by the innocent ship which is recoverable by her. To the extent to which the ship interest is entitled to reimbursement by contributions from freight interest and the cargo interest the wrongdoer is entitled to say to the innocent ship: 'I have by my tort caused you only your net loss'." Such a view regards the contributories as the only persons who have suffered damage in respect of the contributions they have made and assumes that they can recover from the wrongdoing vessel. My Lords, I know no authority for this proposition and I do not accede to it, but I think the same result might be arrived at by regarding the expenditure as made for those who share in the joint adventure and therefore recoverable by the ship which incurred it or by any one of the interested parties to the extent to which the liability was incurred in his interest even though the ship alone made herself responsible for payment of the sum expended to those to whom it was incurred. The proposition is set out in the American case of *The Sucarseco* (2), in the words "The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause. The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the

(1) (1945) 172 L. T. 189, 191. (2) 51 Ll. L. Rep. 238, 241.

“ action taken on behalf of cargo and by its representative to
 “ avert a peril with which that adventure was threatened.
 “ Being cargo’s own share of the expense incurred in the
 “ common interest, the amount which is paid properly belongs
 “ in the category of damage which the cargo owners have
 “ suffered by reason of the collision.” The case was decided
 in 1935 in the Supreme Court and the opinion of the judges was
 delivered by Hughes C.J. If this judgment is right by English
 law as it is in American the appeal must fail. It was, I think,
 upon this view that the judgment of MacKinnon L.J. in the
 present case was based when he suggested that the claims of
 ship and cargo owner should properly have been brought in the
 same proceedings so that overlapping of claims might be
 avoided. His method of approach assumes, as I understand it,
 that the shipowner may claim the whole of his expenses against
 the wrongdoing ship but only on condition that he agrees
 expressly or impliedly to forgo his right to contribution in
 general average. The implication is, I think, that each interest
 is entitled to claim the whole of its own expenditure against the
 wrongdoer only if it has the assent of the other interested
 parties or if it waives its claim against them for contribution in
 general average. Unless it adopts one of these two courses it
 can claim its own proportion only. I know of no authority
 for this conclusion nor can I find that the point has ever been
 decided. Ultimately, the question is, was the expenditure
 incurred on behalf of the various interests or merely for their
 benefit. If the master or owners in incurring it were acting as
 agents for all the interests, presumably each interest can claim
 its share. If, however, the shipowner was acting on his own
 behalf, but with a right of indemnity against the other interests,
 then whatever the rights and obligations of the various interests
 inter se, the only party who could sue the wrongdoing ship
 would be that which had incurred the expenditure. The
 inquiry involves a consideration of the relationship between
 the wrongdoing ship and the various persons interested in the
 adventure and an analysis of the principles to be found in the
 cases dealing with the subject.

In the case of a general average sacrifice the owner of the thing
 sacrificed suffers a physical loss and has a direct claim on the
 wrongdoing ship. Examples are a jettison of cargo and the
 cutting away of a mast. In the case of general average ex-
 penditure, however, there is no physical loss but the liability
 is incurred and the expenditure met in the first instance by the

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ship. Crews' wages and pilotage fees when the ship puts into a port of refuge are instances of such expenditure and the cost of discharging cargo in order to repair the ship, of reloading and of warehousing it in the meantime is also arranged for and paid by the ship in the first instance, wherever the ultimate liability may rest. No doubt it can be said that, whoever may make arrangements for the storing of cargo, the warehouseman has a lien for his charges and to that extent the liability may fall on the cargo owner, but it is the duty of the shipowner to complete the voyage and his remedy against the cargo owner is not for the full cost of warehousing, but only for the cargo owner's contribution in general average. Nor do I think that the respondent advances his case by pointing to cases of sale of part or the hypothecation of the whole of the cargo as instances where the shipowner acts as agent for the cargo owner. No doubt he does act as agent of necessity for the cargo in such cases as indeed he does in cases of jettison, but each is a direct loss imposed upon the interest concerned in the nature of a sacrifice of part of the interest in order that the adventure may be completed. This I understand to be the view of Sir William Scott, as he then was, in *The Gratitude* (1). "... It has been "contended," he says, "that the master has no right to bind "the owners of the cargo . . . upon this ground that . . . "he is not the agent of the proprietors of the cargo, and therefore cannot bind it. . . . This position . . . is, I think, "not tenable, . . . for though in the ordinary state of things "he is a stranger to the cargo, beyond the purposes of safe "custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and "super-cargo is forced upon him It must "unavoidably be admitted, that in some cases he must exercise "the discretion of an authorized agent over the cargo; as well "in the prosecution of the voyage at sea, as in intermediate "ports." He illustrates his point by a comparison with the cases of jettison, ransom and the sale of perishable cargo when driven into port and proceeds (2): "In all these cases, the "character of agent respecting the cargo is thrown upon the "master, by the policy of the law, acting on the necessity of the "circumstances in which he is placed." In each indeed there is either a physical loss of cargo or a direct charge imposed upon it. When a little later Sir William Scott says (3) "it

(1) 3 Ch. Rob. 240, 257, 258.

(3) Ibid. 261.

(2) Ibid. 260.

" appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship, lies in supposing, that whatever is done for the repairs of the ship is in no degree and under no circumstances done for the benefit or with a prospect of a benefit to the cargo ; whereas, the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo," he is to my mind only asserting that there is a general average act done for the common benefit, not that in case of sacrifice the master is acting as agent for ship and cargo alike. Similar observations were made in *Burton & Co. v. English & Co.* (1). Thus Brett M.R. says : " In theory it " (i.e., the right to contribution) " arises from an act done by the master of the ship, not as the servant of the shipowner, but as the servant of the cargo owner, a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the cargo owner for the benefit of the ship and cargo, and not from any act done by the shipowner at all," and again Bowen L.J. says (2) : " This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied term, if you like to call it so, that that principal shall be indemnified afterwards by the rest." These cases, however, deal with sacrifice and not with expenditure.

In the case of expenditure it is claimed that the balance of authority is in favour of the view that the cargo interests can sue the wrongdoer direct because the expenditure is incurred by the master on their behalf and as their agent. It is true that *The Marpessa* (3) decided that a shipowner could not recover his general average contribution to cargo but the ground of that decision is that the contribution is not damage caused by the collision but by the relationship of ship to cargo and that the decision itself, as the respondents maintain, is wrong. It does

(1) 12 Q. B. D. 218, 220.

(3) [1891] P. 403.

(2) Ibid. 223.

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not deal with the question on whose behalf the expenditure was originally made. On the other hand it is said that in *The Minnetonka* (1) and in *The Toward* (2), which was decided by Barnes J. in 1899 the plaintiffs who had made general average contribution were held entitled to recover against a wrongdoing ship and that these cases are direct authorities in favour of the respondents' contention. In the latter case there existed as there exists in this present case a deficiency in the limitation fund, but it was immaterial who was paid and the shipowner did not contest the claim of the cargo interests. In the former the Admiralty had chartered a collier which in the course of her voyage was damaged in collision with another ship and both were partially liable for the collision. Rather than risk deterioration to the cargo and incur the expense of making a general average contribution in order that she might be repaired and the voyage continued, the Admiralty paid a sum of money to the collier as a substituted expense and then claimed their proper proportion of this sum against the wrongdoing ship. The decision of the case, it is true, seems to have turned upon the question whether the compromise was a reasonable one or not. No part of the sum in dispute was either claimed by or paid to the carrying ship. *The Marpessa* (3) was mentioned and does not appear to have been overruled. It had apparently been cited as authority for the contention that the sum paid by the Admiralty, having been paid under a compromise, was not the direct consequence of the collision. Apart from the question of causation of the damage or its remoteness no question as to the right of the Admiralty to sue the wrongdoer direct seems to have been raised but Collins M.R. did say (4): "When we have once disposed of the fact that this sum did not come and *ought not to come* into discussion between the *Minnetonka* and the *Uskmoor*" (the two ships concerned) "it entirely disposes of the suggestion that it was unreasonable to make a settlement without regard to subsequent litigation." That the sum in question had not come into discussion or been the subject of a claim between the two ships was undoubtedly true but whether or no it ought to have been included does not appear to have been discussed. The case however, does seem to be in conflict with *The Marpessa* (3), and at any rate to assume that, apart from any question of the effect of incorporating the York/Antwerp Rules in the contract

(1) [1904] P. 202; [1905] P. 206.

(3) [1891] P. 403.

(2) Shipping Gazette, May 8, 1899.

(4) [1905] P. 206, 215.

of carriage, cargo owners are entitled to claim direct on a wrongdoing ship for the amount of their contribution to general average expenditure as damage flowing from the collision. Moreover it, like *The Toward* (1) is an instance of a suit in which in fact a contributing interest recovered directly from the wrongdoing ship. On the other hand, Mr. F. D. MacKinnon, as he then was, sitting as arbitrator in the dispute subsequently decided in *Chellev v. Royal Commission on the Sugar Supply* (2), says in the case submitted to the court: "In so far as these arguments deal with the master's supposed authority to bind the cargo by incurring general average expenditure, I think they rest on a fallacy. If a master requests, or allows, salvors to render salvage assistance, he no doubt incurs a liability for and on behalf of the cargo; the salvors have a direct claim against the cargo and its owners. If a shipowner pays cargo's proportion of salvage he must reclaim it from cargo owners, not as contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of, and as agent for, the person directly liable. But if the master pays port charges or crew's wages at a port of refuge, that is a liability incurred by him only for his owner. In deciding the extent of the owners' right of contribution to that liability from others it does not seem of service to import considerations as to the master's authority to incur direct liabilities for those others." This view is, I think, at variance with that which he has expressed in the present case, and, for the reasons hereafter given, I prefer his later opinion. Sankey J. appears to approve of this statement (3). In the Court of Appeal, however, Scrutton L.J. is non-committal (4). In his view a distinction might have to be drawn between cases decided under York/Antwerp Rules and those governed by the law of the sea and in taking this view he is to some extent influenced by the judgment of Gorell Barnes J. in *The Mary Thomas* (5). In that case a ship, which was guilty of negligent navigation but by English law entitled to receive contribution in general average because her bills of lading relieved her from liability for negligence, had incurred general average expenditure, and a general average statement had been prepared at Rotterdam. That statement apportioned the general average to the various interests

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(1) Shipping Gazette, May 8,
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(2) [1921] 2 K. B. 627, 632.

(3) Ibid. 639.

(4) [1922] 1 K. B. 12, 20.

(5) [1894] P. 108, 118.

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concerned and the underwriters on ship paid the ship's proportion. But the shipowners failed to recover the cargo's contribution because in spite of the negligence clause, the cargo under Dutch law was freed from liability to contribute by reason of the ship's negligence. The shipowners then sued the underwriters on ship in this country for certain of the expenses attributed by the statement to general average but failed to recover on the ground that all parties were bound by the statement and the shipowner could not rip it up and claim that some of the expenditure so attributed would in this country be charged to the ship. The decision itself is not directly material to the question in issue before your Lordships but Gorell Barnes J. after conceding that in the case of a general average sacrifice the whole loss in respect of the thing sacrificed could be recovered by the party whose property it was, said (1): "But it seems to me that this proposition . . . is wholly "inapplicable to the case of expenditure, and I think it can "almost be demonstrated to be wrong in such a case; because "the operation of saving is taken for the benefit of both the "ship and the cargo . . . and therefore the captain who "at this time, under ordinary circumstances, acts as agent for "the person whose property is at risk, spends the money on "behalf of all who are interested, and all who are interested must "contribute to it, and therefore the shipowner ought only to "contribute so much, and then the underwriters, who have "indemnified, have got to recoup him what he has paid." He adds (2): "Therefore, I hold that the plaintiffs' cannot "either by virtue of any principle, or by virtue of any authority, "claim to recover from the underwriters of the ship, the whole "amount of the expenses incurred in saving the ship and the "cargo, and can only recover the portion properly due to the "ship." A contrary view appears at one time to have been taken in America in *Watson v. Marine Insurance Co.* (3), where it was held that underwriters on ship were liable in the first instance for the whole expense of general average expenditure, and might recover a proportional reimbursement from the other interests. But Phillips on Insurance (5th ed., 1867) in note 5 to para. 1742 says: "I do not see why they are so. "It does not appear why the underwriters on the cargo may "not as well be liable in the first instance for the whole

(1) [1894] P. 118.

(2) *Ibid.* 108, 121.

(3) (1810) 7 Johns. N. Y. 57.

"expense as those on the ship. Each set should surely be
"liable on their own subject only."

It is plain that by English law in the case of general average expenditure an assured can only recover from his underwriter the proportion of loss which falls upon him, whereas in the case of general average sacrifice he can recover his whole loss. See Marine Insurance Act, 1906, s. 66. Nor does it make any difference that the master of the ship has made his owner liable for the expenditure incurred, see *Ocean Steamship Co. v. Anderson, Tritton & Co.* (1). The reason for this rule may be that though the underwriters on ship undertake to reimburse the ship's loss including expenditure to avert a loss they do not undertake to reimburse the shipowner for averting the loss of the property of others, but it gives point to the argument that the wrongdoing ship is not liable to the vessel which she has injured in respect of that portion of general average expenditure which falls upon cargo or at any rate is only liable on the principle enunciated in *The Winkfield* (2). It may similarly be alleged that the expenditure was not incurred for the ship alone but for all the interests concerned, and that the wrongdoing vessel, when sued by the other, is entitled to say, I am under a duty to reimburse you for the expense to which you yourself have been put in averting your own loss but not that expenditure which is incurred to avert loss to the cargo though as bailee of the cargo you may sue for its loss or the expense to which it has been put. It is true that in the case of physical loss a bailee can sue for the value of the property entrusted to his care where that property is lost or injured by the tortious act of a third party—see *The Winkfield* (2). And so a shipowner can sue for loss or damage to cargo entrusted to his care, see *The Joannis Vatis* (3), but in that case he is trustee for the owner of the property to the extent to which he recovers and must pay the whole over to that owner. The grounds on which the bailee may recover are, I think, the fact that he is in possession and that a bailor who entrusts property to a bailee has sufficient confidence in him to make it reasonable that the bailee should recover for any loss of the property and hold the damages he recovers on the same terms as he held the property entrusted to his care. *The Winkfield* (4) also contains the statement of Collins M.R.: "The wrongdoer, having once
"paid full damages to the bailee, has an answer to any action

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(1) (1883) 13 Q. B. D. 651.

(3) [1922] P. 92.

(2) [1902] P. 42.

(4) [1902] P. 42, 61.

H. L. (E.) "by the bailor." And Stirling and Mathew L.JJ. concurred in his opinion. The same conclusion was arrived at in *The Joannis Vatis* (1).

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In this state of the authorities your Lordships have to determine in the first place whether the appellants can sue the wrongdoing ship on the ground that the expenditure was incurred by the master or owners on their behalf and as their agent. Crews' wages, pilotage fees and the cost of feeding the crew are no doubt primarily ship's liability and it does not seem possible to assert that all the interests concerned are directly liable to pay the crew or pilot once a general average act has been done and general average expenditure is incurred. It is more consistent with the realities of the case to hold that the shipowner is directly liable to pay those whom he employs, but nevertheless in incurring the debt and making the payment is acting not only for the ship but also on behalf of all the interests concerned. Nor is there any difficulty in the conception that a man may act between two parties as principal towards one and yet as agent for another. As Blackburn J. said in *Ireland v. Livingston* (2) in advising your Lordships' House, "The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house . . . My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs" (i.e., the commission agents) there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties." So in the present case in my view the owners of the *Greystoke Castle* pledged their own credit as principals to answer for the general average expenditure, but yet acted as agents for the contributories including the respondents in incurring the expense. The expense being thus incurred for the respondents, they can claim against the wrong-

(1) [1922] P. 92.

(2) L. R. 5 H. L. 395, 408, 409.

doer to make good their loss which to the extent of one quarter flows from the wrongful act of the *Cheldale*, none-the-less though the respondents' liability was to reimburse the owners of the *Greystoke Castle* who incurred the expense on their behalf and not to pay those who did the work necessary to enable that ship to proceed on her voyage.

Sir William McNair however contended that the cargo owners' only right was to stand in the shoes of the ship incurring this expenditure and not to sue direct, and therefore that he had no more right of direct recovery in his own name against a wrongdoer than had an underwriter who had paid the loss of the injured ship, see *Simpson & Co. v. Thomson* (1). In his submission the liability to contribute in general average does not constitute a loss directly flowing from the negligent act of the wrongdoing ship and is in any case too remote to be recoverable as damages. *The Marpessa* (2) decides that it is not a direct loss, *The Sucarseco* (3) that in American law it is, and *The Minnetonka* (4) and *The Toward* (5) seem to take for granted that *The Marpessa* (2) is wrong, and may both be used to support the argument that the owner of ship and cargo which is obliged to contribute in general average can sue the wrongdoer for the proportion which he has had to pay. I am not sure that I follow the reason why it was held in *The Marpessa* (2) that general average contribution is too remote to be recoverable as damages. It is true that the wrongdoing ship had no part in creating the relation between the injured ship and the cargo carried by her nor in the liability thereby incurred, but by the law of the sea the relationship exists and the obligation is imposed whether it be regarded as arising from implied contract or legal obligation. In *The Kate* (6), *The Racine* (7) and *The Philadelphia* (8), and in your Lordships' House in *Gracie (Owners) v. Argentino (Owners)* (*The Argentino*) (9), damages at least taking into consideration the loss of a contract, have been awarded. Nor has the decision in *In re Polemis and Furness, Withy & Co., Ltd.* (10), effected any change in this principle. One method of ascertaining the damages in an action of tort is to ask what loss would a reasonable man anticipate as a result of the wrongful act. To this the *Polemis* case (10) added a further liability, viz. damage

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(1) 3 App. Cas. 279.

(2) [1891] P. 403.

(3) 51 Ll. L. Rep. 238.

(4) [1904] P. 202; [1905] P. 206.

(5) Shipping Gazette, May 8, 1899.

(6) [1899] P. 165.

(7) [1906] P. 273.

(8) [1917] P. 101.

(9) 14 App. Cas. 519.

(10) [1921] 3 K. B. 560.

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consisting of the direct physical consequences of the tortious act whether they would reasonably be anticipated or not. It has not narrowed the liability which was previously held to exist. It is said, indeed, that the position of the appellants in the present case is stronger than was that of the defendants in *The Marpessa* (1) in as much as in the latter the ordinary law of the sea was that applicable, whereas in the former there is a special contract to which the appellants were not parties and by the terms of which they are in no way affected. This argument would, I think, have force if the special contract contained any unusual terms, but in the present instance the contract contains nothing exceptional. Indeed if a shipowner were asked to say under what terms he would expect a ship, with which his vessel collides, to be carrying cargo I cannot but think that he would reply, "One governed by the provisions "of the Carriage of Goods by Sea Act and the York/Antwerp "Rules or similar provisions." If then I am right in considering that what would reasonably be expected to result from the wrongful act is one measure of the damages recoverable in tort, my opinion is that a wrongdoer would expect that the cargo owner might have to contribute in general average and that the calculation of the amount of the contribution would be based on the existence of a contract (i.) freeing the carrying ship from liability towards the cargo in case of negligence and (ii.) embodying the York/Antwerp Rules. But it may be said this is an answer to the contention that the damage is too remote, but does not deal with the allegation that it does not flow from the tortious act but from the contractual relationship between the ship and its cargo. Sir William McNair put this contention in the words "Liability or damage arising from a "contract with a third party gives no ground for a claim for "damages in an action for negligence against a wrongdoer "unless the liability or damage arose from physical injury "to the plaintiff's person or to property owned by or in the "possession of the plaintiff." For this contention there may be much to be said where the person or thing injured was not engaged, as is cargo when being carried in a ship, on a joint adventure. I do not, however, think it applies to such carriage. It is true that general average is not affected by insurance law but the outlook upon the mutual obligation entered into by ship and cargo owners resulting in the undertaking of a common adventure may be illustrated by the fact that whereas in non-

marine cases there is no loss unless the thing insured is injured, in marine insurance cases the loss of the adventure constitutes a loss for which underwriters are liable though the cargo itself be safe. For this well-known principle it is enough to quote *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.* (1). Moreover underwriters on cargo must pay the sums contributed by cargo towards general average expenditure as a loss under the policy. When therefore a ship is insured against collision such contributions are held, at any rate so far as underwriters are concerned, to be a loss directly caused by that peril. A further example of the fact that, because of their close connexion, ship and cargo are dealt with on the same principle is to be found in the fact that innocent cargo carried on a ship which shares the blame for a collision can recover against the other ship not its whole damages but only that proportion which the carrying ship can recover against the other. In *The Milan* (2) this result is said to be a rule of the sea and in no way dependent on principles similar to those which would be followed in accident cases on land, and that case was followed and approved in your Lordships' House in *Tongariro (Cargo Owners) v. Drumlairig (Owners)* (3). In such cases there is no question of imputing to the cargo the fault of the carrying ship: the principle adopted is, I think, founded upon the fact that sea carriage is a joint adventure carried on originally often far from home in time and distance and one therefore in which those on the spot must be left to do the best they can in the interest of all. In the case of carriage of goods by sea a general average act is one undertaken to preserve the various interests engaged in the joint adventure and to enable it to be carried to a successful conclusion. Expenditure so incurred is in that sense incurred to preserve those interests, viz., the ship's safety and carrying capacity, the cargo's preservation and safe arrival, and the earning of the freight. In such a case damages which would not normally include those resulting from the loss of the benefit of a contract with a third party where the claimant has not suffered in his person or property may well and I think do extend to those arising from the obligation to contribute to general average expenditure incurred for the purpose of preserving the interests engaged in the joint adventure and enabling that adventure to be brought to a successful conclusion. Such a view receives support from

(1) [1916] 1 A. C. 650.

(3) [1911] A. C. 16.

(2) (1861) Lush. 388.

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and explains the attitude adopted in *The Minnetonka* (1) and *The Toward* (2) and the expressions used in *The Mary Thomas* (3), and is consistent with the contention that contribution to general average expenditure may be a loss flowing from the tortious act of a wrongdoer, though payment of the expenditure falls in the first instance upon one of the interests concerned only and though in paying it that interest may be acting on its own behalf and not as agent for the other parties concerned.

There remains one further difficulty. I have said that in my view the injured ship might sue not only for her own direct loss but also for any damage to the cargo of which she was bailee and similarly might sue as bailee for the expense to which she was put in incurring general average expenditure even though that expense was incurred in the general interest of all those concerned in the adventure. Furthermore, if Collins M.R. be right when he says in *The Winkfield* (4): "As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he," (i.e., the owner of the carrying ship) "is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interest of each must be inquired into, and as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interests he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor"—if, as I say, this be right, a question must arise as to who should recover where both parties have brought actions which are in existence at the same time. That both may sue for loss of or damage to the property at any rate where the bailee is a carrier is stated in terms in *Gordon v. Harper* (5), per Grose J. Moreover, in *Manders v. Williams* (6), Parke B. says: "No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer, the latter by virtue of his possession, the former by reason of his property," though the same learned baron qualifies this statement by saying, as was said by Collins M.R. in *The Winkfield* (4), that an action by one

(1) [1904] P. 202; [1905] P. 206.

(4) [1902] P. 42, 60.

(2) Shipping Gazette, May 8,

(5) (1796) 7 Term. Rep. 9, 12.

1899.

(6) (1849) 4 Ex. 339, 344.

(3) [1894] P. 108.

is a bar to an action by the other : see *Nicolls v. Bastard* (1). The whole question was reconsidered in *Eastern Construction Co., Ltd. v. National Trust Co., Ltd.* (2), where it was said that if the bailee sues he ought to claim and be awarded full damages, for then no further action can be brought by the bailor, but this last case was an action for the conversion of timber and was not complicated by cross-claims or limitation of liability.

A question bearing some analogy to the present case, however was discussed in *The Joannis Vatis* (3). In that case two ships came into collision and before the issue of a writ an undertaking was given on behalf of the one which was later held solely to blame to put in bail to the amount of 100,000*l.* A writ was then issued on behalf of the owners of the other ship and cargo against the wrongdoer and in the course of that litigation the owners of the various parcels of cargo, represented by their underwriters, were asked to join in the proceedings. Some assented and some did not. Later it turned out that the bail was insufficient to meet all claims and the shipowners contended that having sued as owners of the ship and bailees of the cargo they were entitled to receive the whole of the bail, pay themselves the amount of their own damages as shipowners in priority to all other claimants, and that the non-assenting cargo owners had no right to share in the fund. On those contentions, the Court of Appeal held that though as bailees of the cargo the shipowners were entitled to recover the full value of the damage to cargo, they must account to all the owners of the damaged parcels of cargo for their share ; and that it was the duty of the court to see that all persons having a claim on the bail, including the non-assenting cargo owners, shared in the distribution. The dispute arose because the fund to be distributed was less than the total damage suffered and therefore had to be apportioned amongst the various interests, and it had to be determined what interests were entitled to a share in the fund. That difficulty does not arise in the present case : the *Cheldale* has not limited her liability.

The issue is a different one ; it is contended that where two parties are entitled to sue for the same damage, and the shipowner has obtained judgment for the damage to his ship including his general average expenditure from a wrongdoing ship and that damage has been paid or set off against sums which his own vessel owes to the wrongdoer, the wrongdoing ship is

(1) (1835) 2 Cr. M. & R. 659, 660. (2) [1914] A. C. 197. (3) [1922] P. 92.

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entitled to say : " I have already paid the damage and on the " principles laid down in *The Winkfield* (1) my liabilities as " wrongdoer are discharged." I think there is more than one answer to this contention. It might prevail if the owners of cargo had lain by and allowed the shipowner to claim on their behalf, so that the wrongdoing ship had without notice of the separate claim of the cargo owners for general average contribution, paid the full damage to the owners of the other ship. What remedy in such a case the cargo owners would have against the carrying ship I do not stay to consider. But in the present case, the action between the two ships never came to trial : it was settled between them on the basis that the sum payable to the *Greystoke Castle* included the whole of her general average expenditure. Moreover, the cargo owners issued a writ on July 24, 1941, claiming, inter alia, their share of general average expenditure and paid their contribution on February 16 1942, whereas the registrar did not deal with the claims on the limitation fund until June 8, 1943, and though his assessment included an agreed sum in respect of the whole general average expenditure of the *Greystoke Castle*, that assessment has never been confirmed. Indeed, as a result of the President's decision in the present case which imposes a liability on the *Cheldale* for the cargo's proportion of general average expenditure, the sum payable to the *Greystoke Castle* has been increased and that payable to the cargo owners reduced so that cargo owners' proportion of general average expenditure is not now included in the settlement between the two ships, though this position would be reversed if your Lordships thought that the President's judgment was wrong. In these circumstances, it cannot be said that the owners of the *Cheldale* have already paid the general average contribution claimed in this action, and therefore are excused for that reason from paying it in this action. It is still unpaid. If, then, I am right in thinking that the respondents have a direct claim for this contribution in general average which they have made, there is nothing to preclude them from making their claim in this action. I would dismiss the appeal.

LORD SIMONDS. My Lords, the owners of cargo laden on the *Greystoke Castle*, whom I will in future refer to as " the " respondents", were bound to make their full contribution to general average expenditure notwithstanding that the collision

(1) [1902] P. 42.

was due in three-fourth parts to the fault of the *Greystoke Castle*. Moreover, they were precluded by the negligence clause in the bills of lading from claiming against the *Greystoke Castle* for the damage suffered by them as a result of the collision. But the fault was in one-fourth part due to the *Cheldale*. Therefore, the respondents as cargo owners on July 24, 1941, issued a writ against the appellants claiming damages arising out of the collision and on August 1, 1941, the appellants admitted liability for one-quarter of the respondents' claim subject to a reference to the registrar to assess the amount. This brings me to the question which now falls for decision. Are the respondents entitled to recover not only in respect of the physical damage to their cargo, which the appellants admit, but also in respect of their contribution to general average expenditure, which the appellants do not admit? This question has been answered in the affirmative by the learned registrar and by Lord Merriman P. and by the Court of Appeal.

My Lords, it appears to me that the question to be here decided is one that in principle must arise, whenever a cargo owner is called on to contribute to general average expenditure incurred by a carrying ship by reason of a collision for which she has not been wholly to blame, and that the decision must be the same whether or not the issue is complicated by the apportionment of liability and the institution of a limitation action. That the question should to this day be considered an open one can only be explained by the fact that in a business community such questions are settled in a business-like way between the insurance and other interests involved. But it is unfortunate that the parties are not in agreement as to what the practice has been in the half century that has passed since *The Marpessa* (1) was decided. In that case Jeune J. rejected a claim by a carrying ship to recover as damages from the wrongdoing ship the balance of general average contribution due from ship and freight to cargo, holding that the loss sustained by the ship by having to make that contribution was not caused by the collision. "It is," he said (2), "the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution." This direct decision on the point at issue has never been in terms overruled, though I share the view expressed in the courts

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(1) [1891] P. 403.

(2) Ibid. 409.

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below that it is difficult to reconcile with it the decision of the Court of Appeal in *The Minnetonka* (1), and perhaps that of Gorell Barnes J. in *The Toward* (2). But, however this may be, there is, I think, no authority one way or the other binding this House nor any such long and established course of practice as should influence its decision. Lord Merriman P. thought the decision in the *Marpessa* (3) wrong. It appeared to him (4) "well nigh impossible at the present time to argue that the liability of cargo to pay general average contribution towards special expenditure by the carrying ship, even though that ship herself was held to be negligent, was not a consequence which might be reasonably expected in the ordinary course of things to flow from the wrongdoing of the other ship." In other words, the general average contribution was the consequence and not too remote consequence of a tortious act. In the Court of Appeal Scott L.J. took the same view, but supported it by an argument, which with great deference I think untenable, that only the net out of pocket loss, by which he means the net loss after recovering general average contribution, can be recovered by the carrying ship from the wrongdoing ship. This argument appears to me to be inconsistent with the decision in *The Winkfield* (5) which I regard as unassailable. MacKinnon L.J. came to the same conclusion. He did not place the same limit upon the right of recovery by the carrying ship, but, realizing that the same head of damage might on this view be claimed by both ship and cargo but that the wrongdoer could not be called on to meet it twice, he indicated methods of procedure by which this result might be averted. du Parc L.J. concurred. My Lords, in the face of this consensus of opinion it is with much hesitation that I express a contrary view, but after a long consideration of the far-ranging arguments of counsel I see no valid answer to the contentions put forward by Sir William McNair for the appellants.

The first and, as I think, decisive matter is to determine the true nature of the general average contribution made by the respondents. It was a contribution made by the respondents towards the expenditure incurred by the ship arising out of a general average act. That expenditure, details of which appear in the general average statement and adjustment, was incurred

(1) [1905] P. 206.

(3) [1891] P. 403.

(2) Shipping Gazette, May 8,
 1899.

(4) (1944) 171 L. T. 259, 261.

(5) [1902] P. 42.

by the ship and I cannot accept the view that any primary liability was imposed upon the respondents in respect of the items of goods supplied or services rendered which appear in the statement. The master of the ship is no doubt in such an event an agent of necessity for all interests concerned: that is why he can, if the situation demands it, even hypothecate or sell the cargo for the common benefit, and that is why all interests must contribute. The master is the servant of all interests: he acts for all, he is the agent for all, but he is not in respect of general average expenditure the agent for the cargo owner in the sense that the latter is his principal and as such liable for the whole or an aliquot part of the debt due for goods or services. For the whole of such expenditure the ship is liable and the whole of it (subject to any just exceptions) the ship can recover from the wrongdoer. I more than once in the course of the argument invited counsel for the respondents to refer to any case in which the primary liability of the cargo owner as principal of the master who incurred such general average expenditure had been upheld. But he was unable to do so. It seems to me clear that the master is the agent of the ship in respect of such expenditure, though what he does he does for the sake of all concerned. If it were not so, it would be necessary to consider whether the master was the agent for all interests in the sense that they were all jointly or severally liable for all expenditure or in the sense that they were severally liable for an aliquot portion to be subsequently ascertained of such expenditure. This is not an adventure upon which I should care to embark. It would probably surprise the man, who supplied goods to the master or rendered services to him, to learn that there was any such question. Nor can I easily reconcile such a possibility with the question which was debated in *Chellew v. Royal Commission on the Sugar Supply* (1). There the question was whether for the purpose of contribution the value of the cargo should be taken at the termination of the adventure and it was held that it should be so taken when the contract of affreightment was governed by the York/Antwerp Rules, whatever might be the result under the common law. It followed in that case, since the cargo was of no value at the relevant date, that the cargo owner had to contribute nothing. Was he nevertheless as the undisclosed principal of the master liable to the supplier of goods or renderer of services for all or some part of his claim? I conclude, then, that in this case

(1) [1921] 2 K. B. 627; [1922] 1 K. B. 12.

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the obligation and the only obligation of the respondents was to their carrying ship. The nature of that obligation is not in doubt. It has been expounded at length in *The Gratitude* (1) and more recently in *Burton v. English* (2). In the present case it may in a sense be regarded as contractual since the bills of lading themselves prescribe the conditions of general average payment. But, whether it be regarded as contractual or as an obligation imposed by the general law independently of contract, the result is in my opinion the same. For the question is still the same, viz., is the loss which the fulfilment of the obligation imposes a loss which the law recognizes as flowing from the act of the wrongdoer?

My Lords, it is, as I have said before, necessary to disembarass this question of the complexity which arises from apportionment of blame and limitation of liability. It is further necessary to ignore the fact that here the respondents or some of them had claims for physical damage. I will disregard them and assume that I am dealing with a claim for no other damage than that which is involved in the obligation to make a general average contribution. In simple terms A., the ship, has suffered damage which is recoverable against the wrongdoer: B. is bound to contribute to A.'s loss. Can B. recover the amount of his contribution from the wrongdoer? It will be observed that to simplify the problem, I have ignored a point, that may yet be of significance, that A. has included in the expenditure, in respect of which contribution is claimed, items which were agreed to be irrecoverable from the wrongdoer. But, taking the problem in the simple form that I have stated, I do not see how on the ordinary principles of the law of damages B. can recover from the wrongdoer. The principle that I would invoke is nowhere better stated than in *Simpson & Co. v. Thomson* (3). In that case two ships, the property of the same owner, had collided; the underwriters paid the insurance effected on the lost ship and then claimed to rank *pari passu* with the owners of cargo destroyed in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage. But since the owner of an innocent ship could have no claim against himself as the owner of the offending ship, it was clear that the underwriters could not succeed unless they could establish that they had an independent cause of action in tort against the wrongdoer. In other words,

(1) 3 Ch. Rob. 240, 257.

(3) 3 App. Cas. 279.

(2) 12 Q. B. D. 218, 221, et seq.

was the loss which they incurred by reason of their obligation to the innocent ship damage which was at law recoverable from the offending ship? It was held not to be so recoverable and Lord Penzance thus refers to the principle involved in the underwriters' contention, which he proceeds to repudiate (1):

"The principle involved seems to me to be this--that where damage is done by a wrongdoer to a chattel, not only the owner of that chattel but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation." The learned Lord then points out that if this principle is sound it would follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third party this person as well as the owner has a right of action for any loss inflicted on him by their destruction, and after further illustrations, designed to show what would be involved in a decision in favour of the underwriters, rejected the claim upon the ground that no precedent or authority had been found for an action against the wrongdoer except in the name, and therefore in point of law, on the part of one who had either some property in, or possession of, the chattel injured. This case was lightly dismissed by the counsel for the respondents on the ground that general average contribution had nothing to do with insurance. That did not meet the point. The insurer has no independent claim in respect of a wrong suffered by the assured, though he may be subrogated to his right and sue in his name with all the consequences that ensue from subrogation. And this is so notwithstanding that the wrongdoer might well assume, as in the case of a collision between two motor cars, that not only the owner of the innocent car but also its insurer would suffer loss. The reason why he cannot recover is not because it could not be reasonably foreseen that he, or at least some insurer, would suffer, but because his loss is of a kind which the law does not regard as recoverable. So too, with general average contribution. The loss arises from the obligation, whether contractual or imposed by the general law, to indemnify

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another from loss sustained by him. The contributor has no property in, or possession of, the damaged ship. In respect of that damage he has no independent right : in respect of his own loss he can have no action against the wrongdoer. It is irrelevant that the latter might reasonably have foreseen that, if his negligence caused a collision, owners of cargo on the injured ship would probably be called on to make a general average contribution.

I will give only one example of the application of this principle which is in truth fundamental. In *Société Anonyme de Remorquage à Hélice v. Bennetts* (1) the facts were that a steam tug belonging to the plaintiffs was engaged under a towage contract in towing a ship, when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision with and sank the tow. No damage was caused to the tug or her equipment by the collision. Yet the tug suffered loss by reason of the fact that she was unable to complete her towage contract and earn her remuneration. This loss she sought to recover from the defendant. It was the consequence of the collision : it was perhaps a consequence which might be foreseen by one who negligently runs down a tow. Yet it was held by Hamilton J., to be irrecoverable. "In order," he said (2), "to give the plaintiffs a cause of action arising out of that breach" (sc. the breach of the duty of care in navigation) "they must show not only an injuria, namely, the breach of the defendant's obligation, but also damnum to themselves in the sense of damage recognized by law." Then he points out that though "as a direct consequence of the collision" the plaintiffs suffered loss, yet, since all that had occurred was that in the course of performing a profitable contract an event happened which rendered the contract no further performable and therefore less profitable to them, that loss was not recoverable from the wrongdoer. For it appeared to the learned judge that the case fell within the authority of *Cattle v. Stockton Waterworks Co.* (3), and the general statement of the law by Lord Penzance which I have already cited. In the case cited there was a contract of towage, in the case before the House a contract of affreightment : in the one case damage to the tow and the contract made unprofitable to the tug, in the other damage to the carrying ship

(1) [1911] 1 K. B. 243.

(2) Ibid. 248.

(3) (1875) L. R. 10 Q. B. 453.

and burden imposed upon the cargo. In neither case is there any damage recoverable whether by tug or cargo.

My Lords, I share the apprehension expressed by Lord Penzance that a decision in favour of the respondents might have far-reaching and unforeseen consequences, and am tempted to give one more illustration. A. and B. embark upon a joint adventure on the Great North Road. It is an adventure which cannot be successfully prosecuted unless both of them remain sound in wind and limb. Before it has ended, A. is incapacitated by the tortious act of X.: the adventure is abandoned and B. suffers a loss. No one, I suppose, would contend that B. had a right of action against X. I carry it one stage further. A. and B., knowing the hazards of their adventure, agree that, if either of them suffers injury, the other will contribute to his loss. Again, A. is injured by the tortious act of X. B. accordingly pays A. his stipulated contribution. Again B. has no cause of action against X. This, my Lords, I take to be unquestionably the law of the land and I cannot assent to the view that the law of the sea is otherwise. I do not ignore that the law of the sea has many special characteristics, but I do not get any help from the use of such expressions as "joint adventure" "common venture" or "community of interest," which are not terms of art unless they import some notion of partnership or co-ownership. The primary fact is that the cargo owner has made a contract of affreightment with the shipowner. To the relation so created the law adds many incidents, most of which may themselves be varied or abrogated by the contract. Let the proper weight be given to each of the factors which have been so exhaustively described in the opinions of my noble and learned friends, to the character of the master as agent of necessity, to the rights and duties of the parties in respect of general average sacrifice or expenditure, to the special features of marine insurance, to the limitation which may be imposed on the cargo owner's right of recovery against a wrongdoing ship, and any and every other incident in the relation of ship to cargo. Yet, whether I look at them individually or in the aggregate, I find nothing which would justify me in holding that the cargo owner can recover damages from the wrongdoing ship not because his cargo has suffered damage but because he has been placed under an obligation to make a general average contribution. It is convenient and not inapt to say that ship and cargo are engaged in a joint adventure but to do so leads to no conclusion. Nor, as it

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appears to me, is the problem to be solved by saying that in respect of general average expenditure the master acts as agent for all parties. I have shown that he does not act as agent in the ordinary sense of the word, which surely imports in any transaction a threefold relation of A. the principal, B. the agent and C. with whom B. on behalf of A. contracts. I am content to assume that there may be cases in which B., though he does not contract with C. as agent for A., so that there is no privity between C. and A., yet is in a certain sense the agent for A., as for instance in the case of a so-called commission agent, see *Ireland v. Livingston* (1). But with deference I do not see how this helps. The cargo owner makes his general average contribution because he is under a contractual or other obligation to do so, not because the master of the ship is his agent or stands in any other relation to him. Therefore, I would maintain the decision in *The Marpessa* (2), holding that the damage suffered by the cargo owner in respect of general average contribution is damage which the law does not recognize as flowing from the offending act.

Two further observations I must make. It was urged by counsel for the respondents that a decision in favour of the appellants would be inconsistent with the authority of such cases as *The Argentino* (3). This is a misunderstanding. It is beyond doubt that where a ship or other chattel has been damaged its earning capacity is an element in measuring the recoverable damage and that earning capacity may be determined by the contracts that have been made. In that sense a loss of contract is relevant. But it is not the loss of contract which is itself the cause of action. Finally, it was urged that the courts of the United States of America have not followed the decisions in *The Marpessa* (2), and that a divergence in the maritime law of two countries so closely joined together should if possible be avoided. I agree. But in other and perhaps more important respects there has been a divergence and I see no justification for making a breach in an important principle of the common law in order to maintain harmony on this point. I would allow this appeal.

LORD UTHWATT. My Lords, the facts have already been stated and the relevant authorities dealt with and I do not propose to go over that ground again. I will only state, as

(1) L. R. 5 H. L. 395.

(3) 14 App. Cas. 519.

(2) [1891] P. 403.

shortly as may be, the conclusions at which I have arrived as a result of a consideration of the case and the authorities. I have no doubt that in proceedings properly constituted the carrying ship can, apart from the intervention made in due time by the cargo owners, on the principle laid down in *The Winkfield* (1) recover from the colliding ship the whole of the port of refuge expenses in so far as they enter into collision damages. It is no defence to the claim that those expenses were attributable to general average acts on the part of the carrying ship subjecting cargo and freight to a liability to make contribution. But if it be the law that cargo, by virtue of its liability to contribute to such general average expenses as enter into the computation of the collision damages, has a right of action against the colliding ship, and if in fact cargo makes its claim in due time, then in my opinion that claim overrides any claim embracing the same subject-matter made by the carrying ship. The reality of the situation dictates the choice to be made. As between cargo and the carrying ship, cargo is to bear some part of the expenses, and there would appear to be no reason why as between cargo and carrying ship cargo should in respect of any claim for their recovery recede into the background. Again, the circumstance that both ships were at fault in the matter of the collision or that a decree of limitation of liability has been made as respects both or either of them, and the fact that cross liabilities between the ships are settled on the principle laid down in the *Stoomvaart Maatschappij Nederland Peninsular & Oriental Steam Navigation Co. (The Khedive)* (2) do not in my opinion raise any equity in favour of the ship against which the claim of cargo is made for departnre from the choice which I have stated.

In the particular case before your Lordships cargo made its claim in due time. The writ by cargo was issued some two years before the registrar dealt with the claims on the limitation fund provided by the carrying ship the *Greystoke Castle*. If the subsequent course of events be relevant, it may be observed that cargo, before the claims were dealt with, paid its general average contribution to the *Greystoke Castle*, and that the assessment made by the registrar in the limitation proceedings has never been confirmed. Neither the unconfirmed assessment made in proceedings to which cargo was not a party, nor the distribution of the limitation fund (in which cargo was not interested) made, on the basis of the assessment, by agreement

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(1) [1902] P. 42.

(2) 7 App. Cas. 795.

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between the parties interested, can in the circumstances be a bar to the maintenance of cargo's claim. To this indeed it may be added that, on the figures involved, acceptance by the *Cheldale* of cargo's present claim would have increased the amount payable out of the limitation fund to the *Cheldale*. There clearly has not been any payment by the *Cheldale* to *Greystoke Castle* in respect of the sum now claimed by cargo. Payment adds to the recipients' funds: it does not diminish them. It is therefore not necessary to consider what is the position between cargo and the carrying ship when accounts between the two ships have been duly and finally settled. The nice questions as to the accountability of the carrying ship to cargo raised by the method of settling cross liabilities between the ships and by any decree of limitation of liability may well be left to be dealt with when they arise.

The point at issue has been stated in the form: "Can cargo owners recover against the colliding ship the general average contribution to the carrying ship in respect of port of refuge expenses?" That method of statement, though convenient, diverts attention from the real question, which clearly appears from the terms of the registrar's report, namely, whether the cargo owners are entitled to recover such part of the collision damages as under their obligation to contribute to general average in respect of port of refuge expenses falls to be borne by them. The total amount recoverable from the colliding ship is not affected. The question is, who can recover it? General average sacrifice is not in question, and the position of any additional expenses appearing in the general average contribution which do not enter into collision damages is not involved in the appeal.

My Lords, under the law of the sea there is recognized a community between ship and cargo that does not obtain between carrier and customer on land. This is shown by two well settled principles. First, if a collision causing damage to cargo occur, and the carrying ship and the other vessel are both in fault, cargo could under the old law recover only a moiety of the damage and under statute can now only recover a due proportion determined by the degree of blame. That conception finds no place in land carriage, where there would be joint liability for the whole. Secondly, the liability to contribute to general average expenditure is part of the law of the sea. The principle involved in general average contribution is peculiar to the law of the sea and extends only to sea risks. (Cf.

Falcke v. Scottish Imperial Insurance Co. (1.) The law of the sea apart, neither at law nor in equity can contribution be obtained on the ground that loss incurred by one person has delivered another from a common danger (see *Johnson v. Wild* (2)), or that expenditure incurred by one person has incidentally benefited another (cf. *Ruabon Steamship Co., Ltd. v. London Assurance* (3).) Agency is not implied from the circumstances, and there is no equity to claim relief. The sufferer both at law and equity must look to gratitude and not to the courts for his recompense. Under the law of the sea, however, ship and cargo are linked together in the fortunes of the voyage and, in a loose sense, there is in some respects a compulsory partnership between ship and cargo in respect to the venture of sea carriage : Bell's Principles, 9th ed., s. 437 ; Bell's Commentaries, 5th ed., vol. I., p. 534. Section 66 of the Marine Insurance Act, 1906, aptly refers to the matter as " the common adventure." A breach of the duty to take care involving only damage to the ship may therefore be and in my opinion is a breach of duty owed to cargo. 1

The recognition of this community of interest between ship and cargo does not help the cargo owners' claim in these proceedings if in truth general average acts involving general average expenditure are merely acts done for the sake of all and not acts done on behalf of all. If they be only the former, the obligation is to give partial indemnity to the ship and a direct claim by the contributor against the wrongdoing ship is not permissible. (*Simpson & Co. v. Thomson* (4).) If they be the latter, the expense entering into the collision damage to the ship, to which, consequent on interest in the venture, cargo is put by reason of an act done on its behalf, appears to me to be a direct loss incurred by the cargo as the result of a breach of duty to take care owed to the persons interested in the venture.

There are many cases in which the nature of general average acts involving expenditure has been stated, but in none of these has it been expressly decided whether they are acts done for the sake of all or acts done on behalf of all. My noble and learned friends Lord Roche and Lord Porter have dealt with many of the relevant authorities, and a consideration of those authorities and the language used in other cases—not, I agree, directed to the specific point—leads me to the conclusion that the acts are in

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(1) (1886) 34 Ch. D. 234, 248. (3) [1900] A. C. 6.

(2) (1890) 44 Ch. D. 146.

(4) 3 App. Cas. 279.

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law done on behalf of all in the sense that they are done by the actor as agent for all. The acceptance of this view relates the consequences of the general average act to a definite and intelligible principle. Upon this matter I would add two observations. First, the circumstance that the shipowner pledges only his own credit in the contract involving the expenditure is in no way inconsistent with the assertion that in respect of the general average act he is the agent of all concerned. The transaction is one thing: the method of finance is another, and is only machinery. Second the liability to contribute arises on the doing of the act (see *Hain Steamship Co., Ltd. v. Tate & Lyle, Ltd. (1)*), and the circumstance that the liability is defeated by non-arrival of the cargo at the port of destination is to my mind irrelevant in arriving at a conclusion whether or not the actor was acting as agent of all. Holding these views as to the relation between ship and cargo and the nature of a general average expenditure, I am of the opinion that cargo liable to contribute to general average has a direct claim against the colliding ship.

There are only two other matters to which I need refer. In the particular case it was a provision of the bills of lading that general average should be paid according to York/Antwerp Rules, 1924, and as to matters not therein provided for according to the law of New York. Under these rules the circumstances in which liability to general average is to attach and the extent of the liability differ somewhat from the provisions of the general maritime law. In my opinion, the incorporation of these rules raises no new question of principle. For the purpose in hand the rules merely define the extent of the interest of cargo in the venture in which ship and cargo are jointly engaged. Why should not they define their interest as they please? The quantum of the colliding ship's liability is not affected. Second, in possibility, acceptance of the position that the several persons interested in cargo have independent rights of action on the basis I have stated may lead to multiplicity of suits. That objection is irrelevant in determining the law, but in practice the habit of insurance and the common sense of commercial people reduce the probability of many suits to a vanishing point. But however this may be, courts of equity had an excellent rule under which a point was not determined unless all persons interested in that point were before the court. As I understand the procedural rules now in

force, there is no reason why in an appropriate case all parties interested should not in some capacity be brought before the court. There is no real risk of multiplicity of suits. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Ingledew Mather & Dickinson, Newcastle-upon-Tyne.*

Solicitors for respondents: *Thomas Cooper & Co.*

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[PRIVY COUNCIL]

FIBERGLAS CANADA, LIMITED AND
ANOTHER APPELLANTS ;
AND
SPUN ROCK WOOLS, LIMITED AND
ANOTHER RESPONDENTS.

J. C.*

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Patent — Licensee — Person claiming under the patentee — Right to sue for damages—Injunction to restrain infringement— Patent Act, 1935, S. C. c. 32, ss. 55, 57.

A licensee of a patent is a person claiming under the patentee within the meaning of s. 55 of the Patent Act, 1935, of Canada, and as such is entitled under the section to sue for damages for infringement, and in an appropriate case an injunction to restrain infringement may be granted under s. 57 of the Act.

Judgment of the Supreme Court [1943] S. C. R. (Can.) 547, affirmed on this point, but reversed in the result.

APPEAL (No. 62 of 1944), by special leave, from a judgment of the Supreme Court of Canada (Davis, Kerwin, Hudson and Taschereau JJ., Rand J. dissenting) (October 5, 1943) which reversed a judgment of the Exchequer Court of Canada (Maclean P.) (July 2, 1942) and dismissed the appellants' action for infringement of a patent.

The facts appear from the judgment of the Judicial Committee.

1947. Jan. 13, 14, 15, 16. *Lloyd Jacob K.C.* and *Kenneth Johnston* for the appellants.

*Present: LORD THANKERTON, LORD PORTER, LORD GREENE M.R., LORD SIMONDS and LORD UTHWATT.

J. C. *Burrell* K.C. and *Gahan* for the respondent *Spun Rock Wools, Ltd.*

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Feb. 25. The judgment of their Lordships was delivered by LORD SIMONDS. This appeal, which is brought from a judgment of the Supreme Court of Canada reversing the judgment of the Exchequer Court of Canada, raises in the first place a question as to the validity of certain Letters Patent, and in the second place questions as to the title of the appellants (the plaintiffs in the proceedings) to sue in respect of any infringement and as to the appropriate relief, if any, to be granted to them.

The Letters Patent in suit were granted on July 4, 1933, to a Dutch company called N.V. Mij tot Beheer en Exploitatie van Octrooien, which will be referred to as "*Maatschappij*," for an invention made by Friedrich Rosengarth and Fritz Hager. *Maatschappij* was at all material times the legal owner of the patent, but, as it was a company domiciled in Holland, on the occupation of that country by the German enemy in May, 1940, its interest under the patent and under certain agreements to be later mentioned vested in the respondent the Custodian by virtue of the provisions of s. 21 of the Consolidated Regulations Respecting Trading with the Enemy, 1939. The Custodian was accordingly made a defendant to the action, hereafter mentioned, but no relief was claimed against him and he has taken no part in the proceedings.

The appellants *Fiberglas Canada, Ltd.* (which will be called "*Fiberglas*") and *Owens-Corning Fiberglas Corporation* (which will be called "*Owens-Corning*") claim to be interested in the patent under divers agreements to which reference will be made later. It is sufficient for the present purpose to say (a) that in the year 1941 *Fiberglas* commenced an action in the Exchequer Court of Canada against the respondent *Spun Rock Wools, Ltd.* (which will be called "*the respondent*") and the Custodian claiming to be a licensee of the rights under the patent and alleging that the respondent had infringed the patent, and (b) that *Owens-Corning* were, after judgment in the Exchequer Court, added as plaintiff in order to cure any defect in the title of *Fiberglas* to sue.

By way of defence to the action so brought the respondent in the first place put *Fiberglas* to proof of its title to sue, and in the second place, challenged the validity of the patent. It did not deny that, if the patent was valid, it had infringed.

There is not, therefore, and never has been, any issue of infringement in the case. The validity of the patent was contested on the grounds of (a) anticipation and (b) lack of subject-matter. With this issue their Lordships will now deal, reserving for later consideration the question of the appellants' title to sue.

The invention in question was made in 1931 and, as stated in the patent specification, it relates to "the production of fibres" or threads from glass, slag or the like meltable materials." It is convenient to set out the material part of the description in the specification, which is as follows: "The production of fibres or threads from molten glass, so-called glass silk, is hitherto performed by means of spinning machines on which the threads are drawn from prepared glass rods or from the molten mass through nozzles, while in the manufacture of slag wool the threads are produced by the aid of steam or air blowers. It is the object of the invention to provide a novel method and device for making fibres or threads of the kind stated. According to this invention, the hot liquid glass or slag mass is flown in a continuous and uniform thin stream on to a rapidly rotating body, such as a disc of suitable material. On the disc the liquid mass is scattered into minute drops, which are thrown off by the centrifugal force and simultaneously formed into thin threads which sink down in the space around the rotating disc and can be collected as a uniform fibrous web. Owing to the higher momentum imparted to heavier particles, such as thicker drops and threads, these are thrown off the disc to a greater distance and thus can be easily separated from the threads of the normal or desired thickness." The specification then describes the invention in greater detail by reference to accompanying drawings, to which it is not necessary to refer at length. But it may be noted that provision is made for regulating the temperature of the material discharged on to the disc so as to avoid premature cooling, and that the liquid mass is described as being "scattered on the disc 10 into minute particles and thrown off the disc in horizontal direction forming a kind of gloriole of thin threads which sinks down between the disc 10 and the guard wall 8." Then it is said that: "This sinking mass constantly increased by the succeeding fresh threads surrounds the shaft 13 as a jacket-like envelope. . . ."

This being the description of the invention, the first claim is as follows: "1. A method of producing fibres from molten

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" glass, slag and the like meltable material, consisting in setting
" up a flowing stream of molten material, delivering this stream
" on to a rapidly rotating surface and causing it to be thrown
" off the said surface by centrifugal force in the form of fine
" fibres." Numerous other claims follow, but it is common
ground that the first claim only need be considered for the
purpose of these proceedings.

The first question is whether the patent is invalid on the ground of anticipation, and that issue was before their Lordships' Board narrowed down by the admission of counsel for the respondent that he relied on one prior publication only, namely, a patent granted out of the United States Patent office to Alexander D. Elbers on August 1, 1876. It is necessary to examine this patent somewhat closely. The inventor, by the specification, claims that he has invented a new and improved apparatus for, and method of, disintegrating molten scoriaceous substances. He says that his invention has for its object to provide means for reducing such substances to a fibrous condition for producing what is known as mineral wool, and explains that theretofore such reduction was usually effected on such substances by a jet of air or steam propelled through or against a stream of molten slag or scoria, but that in practice he had found that on striking the flowing mass the force of the jet of steam or air was spent to a greater or less degree and that the reduction was consequently not as perfect as it would be if less changeable power were applied. He refers to the proportion of objectionable bead-like globules which are consequently produced, and then thus describes his invention: " My invention consists in the use of a rotary paddle-wheel, " which I apply to the molten scoriaceous matter." The method of application is then described. A wheel with a " suitable number of projecting blades or buckets " is placed beneath the outlet of a trough containing the scoriaceous matter so that " revolving with proper velocity its blades will strike " and diffuse the molten mass, whirling it with considerable " force through the air and causing its disintegration into fibres " or other small particles whose form will, of course, vary " according to the nature and composition, and even degree of " heat, of the matter acted on."

Nothing, as it seems to their Lordships, could be clearer than that this invention, which appears never to have been used, merely substitutes for the propulsive power of a jet of air or steam the striking force of the blades of a rotary wheel.

Whether or not, as counsel urged on their Lordships, there is theoretically an element of centrifugal force in the operation, it is not this force on which the inventor relies. This is made abundantly clear by the disclaimer which follows: "I am aware," he says, "that shot has been already produced by the centrifugal force of a rotary disc on whose face the molten metal was poured: and this I do not claim, as my invention refers to the production of mineral wool and to the use of a wheel having projecting paddles that strike the molten mass as they revolve and affect it mechanically" and, having thus disclaimed, he proceeds with a significant "But" to claim, "But I claim as my invention: (1.) the method herein described of forming scoriaceous substances into mineral wool by exposing the same in a fluid state to the action of a rotary paddle-wheel . . . (2.) the combination of the rotary paddle-wheel A with a conduit B and receptacle C all combined for action on molten scoriaceous substances substantially as herein shown and described."

So far then as the patent is challenged on the ground of anticipation their Lordships see no force in the objection. As was pointed out by Rand J. in his dissenting judgment in the Supreme Court, Elbers himself, admittedly a great authority on this subject, published in the "Engineering and Mining Journal" of August, 1899, an article in which he gave a full history of the production of mineral wool. In this article there is no reference to the invention of 1876. It is in fact clear that at no time did the utilization of centrifugal force for the making of fibre suggest itself to his mind. Yet the use of this and no other force is the essential feature of the patent in suit.

Their Lordships turn then to the other ground of objection, namely, lack of subject-matter. It is, as it appears to their Lordships, this objection which led the Supreme Court by a majority (reversing the decision of Maclean J. in the Exchequer Court) to pronounce against the validity of the patent. But to their Lordships the reasoning of the learned trial judge and of Rand J., who dissented in the Supreme Court, appears preferable. On this issue the contention of the respondent was clearly and fairly thus stated by Rand J. (1): "The principle of disintegration of molten material by means of a rotating disc has long been a matter of common knowledge; that of the production of fine fibres by propelling globules of molten material, of suitable viscosity, through the air,

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"equally so: the bringing together of these two well-known operations by the method challenged was an ordinary extension of the art and not one which called for the exercise of invention." While Elbers' patent alone was relied on for anticipation, that and numerous other patents and articles were cited for the purpose of showing the extent of common knowledge in the art and the lack of subject matter in the invention. The result of them is succinctly stated in the first two sentences of the passage just cited from the judgment of Rand J. But nothing could be more significant than the failure of Elbers himself to see that, just as shot had been formed by the disintegration and dispersal of molten material from a rotating body, so also by the use of centrifugal force the molten mass disintegrated into small particles could be thrown off the rotating surface in the form of fine fibres. As it was with Elbers, so it was with those who after him studied or practised the art. In 1923 the development of the art was narrated by one, A. B. Saborsky, in an article in the "Journal of the American Ceramic Society." In this exhaustive account of the art as it was developed to that date, while every known method of manufacture of glass wool, including the so-called Gossler process (with which the patent in suit has nothing in common) is described and commented on, no suggestion is made of the process which is the subject of the present claim. The significance of this fact is emphasized by the urgent need of Germany for insulating material during the 1914-1918 war when her supply of natural asbestos had been cut off and, as Saborsky says, "all thinkable possibilities were tried." It appears to their Lordships to be impossible to deny to the inventors of this process a measure of inventive skill which amply supports the patent. They would once again adopt the language of Rand J. as expressing clearly the view which they take (1): "But even if it were assumed that there is sufficient in the case to justify the conclusion that the method of disc disintegration was one that had seen actual use, it cannot, in my opinion, be said that the adaptation of such a machine to produce glass wool through a combined action of disintegration and propulsion is analogous to disintegration alone for entirely different purposes. It is a new use with a new product not cognate in any sense of patent law with the previous operation or its product." Their Lordships are therefore of opinion that the objection based on lack of subject-matter also fails.

(1) [1943] S. C. R. (Can.) 563.

It remains to consider the questions of title and appropriate relief. As has been already pointed out, there are two appellants, Fiberglas and Owens-Corning. Originally the first appellant alone was plaintiff, and at the hearing it was contended by the respondent that he had failed to prove his title to sue. Counsel for the respondent made this statement: "This is not a superficial objection. It is divided into two parts. The first has to do with the validity of the assignments and the second part has to do with the custodian and the right of a licensee to sue." With the second part of the objection, which appears to raise pure questions of law, their Lordships will deal later. It is necessary to follow what happened in regard to the first objection. Counsel for the plaintiff having put in evidence three documents, by which he sought to establish the present title of Fiberglas to sue for infringement, said immediately before calling his oral evidence: ". . . . I am as anxious as my learned friend, Mr. Herridge, to shorten the proceedings and, if my friend's objection went to any of these three documents which I have filed, the objection could be simply removed by adding Owens-Corning Fiberglas Corporation as a plaintiff and I have their consent for that purpose." To this the learned trial judge replied: "You can make an application later on, if Mr. Herridge still persists." No other reference to the matter is to be found in the record, but it is to be assumed that Mr. Herridge did persist, for at the conclusion of his judgment the trial judge said (1): "At the trial Mr. Smart made a formal application for leave to join the Owens-Corning Fiberglas Corporation as a plaintiff herein, which leave is granted, upon the filing of the appropriate consent." Accordingly, after judgment Owens-Corning was added as a plaintiff and the statement of claim was formally amended. When the case was taken on appeal to the Supreme Court by the present respondent it appears both from the factum of the respondent and from the judgments of the learned judges of that court that the question of the status of the plaintiff was seriously raised, but it would appear from the judgments at least that the matter substantially in issue was what were the rights of a licensee under the relevant provisions of Canadian law. In the result, their Lordships have not the advantage of the opinions of the judges of the Canadian courts on the question which was argued with great elaboration before them as to the effectiveness of the assign-

(1) [1942] Ex C. R. 79.

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ments under which the appellants claim. Their Lordships do not think it necessary in the circumstances again to examine in detail the several documents. With the assistance of counsel they did so at the hearing and were satisfied that the appellants had established their title to sue as licensees, and it is plain that the learned judges of the Supreme Court took the same view.

There remains, then, the question of general importance, what, under Canadian law, are the rights of a licensee of patent? The respondent contends that a licensee has no right to sue for damages and that even if he has such a right he has no right to an injunction to restrain infringement. The first relevant provision is s. 55 of the Patent Act, 1935, which provides as follows: "55.—(1.) Any person who infringes a patent " shall be liable to the patentee and to all persons claiming " under him for all damages sustained by the patentee or any " such person, by reason of such infringement.

" (2.) Unless otherwise expressly provided, the patentee shall " be or be made a party to any action for the recovery of " such damages." Here the question is, whether a licensee is a person claiming under the patentee. On this question; even if it was argued before him, the learned trial judge can have had no doubt; for he makes no mention of it in his judgment. In the Supreme Court Davis J. (with whom Taschereau J. concurred) held that a licensee is for the purposes of the section a person claiming under the patentee. Kerwin J. came to the same conclusion, pointing out that in the Act of 1935 the relevant provision was recast, the words " the patentee " and all persons claiming under him " taking the place of the words " the patentee or his legal representatives," which occurred in the earlier Patent Act of 1932, and were not apt to include a licensee. On this question neither Hudson J. nor Rand J. expressed an opinion, but the latter judge, who was in favour of dismissing the appeal, can have had no doubt on the matter. In the face of this consensus of opinion on a Canadian statute their Lordships would in any case hesitate to express a contrary view. But it appears to them that the statutory amendment of 1935 following on the decision of *Electric Chain Co. of Canada, Ltd. v. Art Metal Works Inc.* (1) points irresistibly to the conclusion that licensees are persons claiming under the patentee within the meaning of the section. The patentee by definition means the person for the time being entitled to the benefit of a patent. Section 55, sub-s. 1, contemplates an action

not only by the person for the time being entitled to the benefit of a patent but also by any person claiming under that person. On the plain language of the section a licensee answers that description. The appellants as licensees were therefore entitled to sue for damages under s. 55. If so, it is clear that the court could also grant an injunction restraining infringement, if it thought fit to do so. An attempt was made to limit the rights of a licensee at least to damages. There appears to their Lordships to be no reason why in an appropriate case the remedy of injunction should not be granted under s. 57 of the Act and this appears to them to be such a case.

Finally, the form of order requires some consideration. In the first place, the respondent criticized the language of the injunction. Their Lordships do not lay down any precedent or seek to disturb any form which may be established in Canada, but since both parties consent to an amendment they think that the restraint should be "from infringing claim 1 of the said "letters patent" [not "and from" but] "by making, etc., "etc." In the second place, since the action is in substance an action by Fiberglas, whose right and interest as licensee began on December 29, 1939, it should be made clear in the order that the damages recoverable are limited to the damages suffered after that date by Fiberglas as beneficial owner or by Owens-Corning as trustee for Fiberglas. This will involve certain consequential alterations in the order as to delivering up. In the third place, the respondent contending that in the circumstances of the present case the appellants have no right at their election to an account of profits, and the appellants by their counsel stating that, whether or not they have such a right, they propose not to exercise it but to take an inquiry as to damages, their Lordships, without expressing any opinion on the point, think that the order should be amended by excising all reference to an account of profits.

On the whole case their Lordships are of opinion that the appeal must be allowed, that the respondent must pay the costs of the appellant of this appeal and of the appeal to the Supreme Court and that the order of Maclean J. must be restored subject to such alterations as have been indicated, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondent Spun Rock Wools, Ltd.: *Parker, Garrett & Co.*

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[PRIVY COUNCIL.]

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MOHAMED AMIN APPELLANT ;
 AND
 JOGENDRA KUMAR BANNERJEE AND
 OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA

Malicious prosecution—Action for damages—Stage at which action is founded—When damage to plaintiff results.

The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution, but whether such proceedings have reached a stage at which damage to the plaintiff results.

The Board were not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first sought to set the criminal law in motion would per se found an action for damages for malicious prosecution.

Principle of decision in *Golap Jan v. Bholanath Khettry* (1911) I. L. R. 38 C. 880, examined.

Yates v. The Queen (1885) 14 Q. B. D. 648, distinguished.

Bishun Persad Narain Singh v. Phulman Singh (1914) 19 C. W. N. 935, and *Savile v. Roberts* (1698) 1 Ld. Raym. 374, referred to.

Decree of the High Court set aside.

APPEAL (No. 5 of 1946) from a judgment and decree of the High Court in its civil appellate jurisdiction (February 1, 1945) affirming a judgment and decree of that court in its original civil jurisdiction (March 31, 1943) dismissing the appellant's suit for damages for malicious prosecution.

The following facts are taken from the judgment of the Judicial Committee. In March, 1940, an agreement was entered into between the appellant and the first respondent which was contained in certain letters whereby the appellant agreed to sell certain property to a company which was to be formed by the first respondent. The appellant alleged that subsequently an oral agreement was made between himself and the first respondent containing certain provisions which went

* *Present* : LORD UTHWATT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

beyond the written agreement. The third respondent company was incorporated on April 16, 1940, to carry out the purchase from the appellant, and certain property was transferred by the appellant to such company. Subsequently the appellant took the view that the terms of the oral agreement which he had made with the first respondent had not been carried out, and accordingly he refused to transfer the rest of the property included in the sale to the company. The dispute, as the learned trial judge in this suit had held, was of a purely civil character. On September 16, 1940, the second respondent, acting on behalf of himself and the first and third respondents, filed a petition of complaint against the appellant in the court of the Police Magistrate at Sealdah, a suburb of Calcutta, under the provisions of s. 190 of the Code of Criminal Procedure. The petition, after setting out the facts relating to the dispute, alleged that as the accused had refused to deliver the remainder of the properties agreed to be sold he had committed an offence under s. 422 of the Indian Penal Code or s. 406 of the Code in the alternative, and asked that he might be summoned to answer the said charge. The charge was duly registered by the magistrate on September 16, 1940, as a charge of cheating under s. 420 of the Indian Penal Code, and it was not disputed that the charge was intended to be one of cheating under s. 420 or criminal breach of trust under s. 406.

The magistrate, having taken cognizance of the complaint, forwarded it to a Mr. N. N. Mukherjee for inquiry and report under the provisions of s. 202 of the Code. Mr. Mukherjee, by letter dated September 22, 1940, gave the appellant notice that a criminal case had been instituted against him by the second respondent, that it had been referred to the writer for inquiry, and that the inquiry would be held on October 25. For some reason, which had not been explained, Mr. Mukherjee did not hold the inquiry, and the magistrate then referred the matter to a Mr. Bannerjee, who also did not hold the inquiry. Thereupon the magistrate himself held the inquiry in open court. Notice of the inquiry was given to the appellant, who attended with counsel. At such inquiry the first respondent deposed that "we have brought this case for cheating us against the accused Md. Amin." On December 3, 1940, after the completion of the inquiry, the magistrate made an order, which concluded with these words: "No case of cheating and, for the matter of that, no criminal case of any nature could be made out by the complainant." He thereupon dismissed the complaint under s. 203 of the Code of Criminal Procedure.

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On June 26, 1941, the appellant filed this suit against the respondents. The only effective defendants were Nos. 1 to 3 (respondents Nos. 1, 2 and 3). No relief was claimed against defendants (respondents) Nos. 4, 5 and 6. The plaintiff claimed certain relief arising out of the civil dispute with the respondents Nos. 1-3, but that part of his action was dismissed by the trial judge and was not the subject of appeal. The claim relevant to this appeal was for Rs. 28,500 for damages for malicious prosecution, made up of costs incurred in his defence to the inquiry, damage to business and damage to reputation. The case was tried by Gentle J. on the original side of the High Court. The learned judge held that there was no reasonable and probable cause for the criminal proceedings taken by the respondents, that there was not the slightest justification for filing a criminal complaint, and that the respondents were actuated by malice. The learned judge, however, felt himself bound to follow *Golap Jan v. Bholanath Khettry* (1) and to hold that the plaintiff's suit failed since there had been in law no prosecution. The learned judge stated that in the absence of authority he would have been inclined to a contrary view, and that the only damages which he would have awarded, had the suit succeeded, would have included Rs. 1,000 in respect of the costs to which the appellant had been put in connexion with the filing of the complaint. He was not satisfied that the loss of business alleged in the plaint had been established, and he did not deal with the claim to damages for loss of reputation. Accordingly, by decree, dated March 31, 1943, the plaintiff's suit was dismissed. From that decree the plaintiff filed an appeal, and on February 1, 1945, the appeal was dismissed. The learned Chief Justice (Derbyshire C.J., with whom Lodge J. agreed), who gave the leading judgment, followed *Golap Jan v. Bholanath Khettry* (1) and expressed the view that the case was rightly decided.

Section 190 of the Code of Criminal Procedure, so far as relevant, enacted that except as thereafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate or other Magistrate therein mentioned might take cognizance of any offence (a) on receiving a complaint of facts which constituted such offence. The exceptions referred to were not relevant to this appeal. Chapter 16, which was headed "Of complaints to Magistrates," contained the following provisions :

(1) (1911) I. L. R. 38 C. 880.

" Section 200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the magistrate : "

" Section 202. (1.) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under s. 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint :

" Provided that, save where the complaint has been made by a court, no such direction shall be made unless the complainant has been examined on oath under the provisions of s. 200.

" (2A.) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath."

" Section 203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under s. 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

Chapter 17, which was headed " Of the commencement of Proceedings before Magistrates," laid down the procedure when the magistrate decided to issue process on the complaint.

1947. Feb. 13. *Sir Thomas Strangman K.C., Bagram and Jayakar* for the appellant. In England, speaking generally, on an information being presented a magistrate may do one of two things, either dismiss it or issue process. In India there is a difference ; the magistrate can either dismiss it, or issue a summons, or he can take an intermediate course by holding an inquiry at which the accused may be present. In this case the accused was given notice and was present at the inquiry.

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In *Golap Jan v. Bholanath Khettry* (1) the Calcutta High Court held that an action for malicious prosecution would not lie on the ground that the complaint having been dismissed after inquiry no prosecution had commenced. That view was followed in other Indian High Courts, but subsequently differed from in the High Court of Calcutta itself: *C. H. Crowdy v. L. O. Reilly* (2); *Bishun Persad Narain Singh v. Phulman Singh* (3), which is directly in point; *Narendra Nath De v. Jyotish Chandra Pal* (4); *Rabindra Nath Das v. Jogendra Nath Deb* (5) and *Gur Saran Dass v. Israr Haider* (6). Cases which followed *Golap Jan's* case (7) and which are therefore against the appellant are *Sheik Meeran Sahib v. Ratnavelu Mudali* (8), *Subhag Chamar v. Nand Lal Sahu* (9), *Ali Muhammad v. Zakir Ali* (10) and *Gowri Singh v. Bokka Venkanna* (11). The complainant here is in effect by necessary implication asking for process to be issued, and when the magistrate says that he will take cognizance and hold an inquiry, and the accused is present and incurs expenses in presenting his case, all the ingredients are there, and an action would lie because the magistrate has acted on the complaint. It is much too narrow a view to say that on the provisions of the Criminal Procedure Code prosecution does not begin until there is the issue of a summons. The answer to that is that malicious prosecution is really a misleading term; it is malicious abuse of the process of the court, and in this case there was a process in the court, because the court said that there would be an inquiry at which the appellant would have an opportunity of being present. With regard to damages, general damages is a necessary incident to a matter of this kind: *Mudhun Mohun Doss v. Gokul Doss* (12).

Khambatta K.C. and *Umrigar* for the first respondent. An inquiry by a magistrate under s. 202 of the Criminal Procedure Code into a complaint does not constitute a prosecution. The principle governing this matter is the same both in England and in India, and in *Yates v. The Queen* (13)

(1) I. L. R. 38 C. 880, 886.

(8) (1912) I. L. R. 37 M. 181.

(2) (1912) 17 C. W. N. 554, 562.

(9) (1928) I. L. R. 8 Pat. 285.

(3) (1914) 19 C. W. N. 935, 963.

(10) (1931) I. L. R. 53 A. 771,

(4) (1922) I. L. R. 49 C. 1035,

773.

1038.

(11) (1935) I. L. R. 13 R. 764.

(5) (1928) I. L. R. 56 C. 432,

(12) (1866) 10 Moo. I. A. 563,

434-5.

574-5.

(6) (1927) I. L. R. 2 Luck. 746.

(13) (1885) 14 Q. B. D. 648,

(7) I. R. L. 38 C. 880

656-7.

it was stated that "for this purpose one must determine when the prosecution by criminal information commences laying the information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced?"—"although," as is stated in Clerk and Lindsell on Torts, 9th ed., p. 665, "when once a summons is issued, the commencement of the prosecution relates back to the laying of the information." The reasoning of Sir Lawrence Jenkins C.J. in *Golap Jan's* case (1), on which reliance is placed, is enforced by the provisions of the Code of Criminal Procedure, and it is of relevance that ss. 202 and 203 both deal with a stage before the issue of process. Section 204 deals with the issue of process. So when it is said that malicious prosecution is the abuse of the process of the court, that can only mean when process is commenced. The proceedings at the stage of the complaint before the magistrate are privileged; the stage of prosecution is not reached until the magistrate says under s. 204 of the Criminal Procedure Code that he is satisfied that there is a *prima facie* case and a summons will issue for the attendance of the accused. *Gaya Parshad Tewari v. Bhagat Singh* (2) gives some help on the present case. The remedy in a case like this is provided by the statute: Code of Criminal Procedure, s. 250. The appellant has made out no case for damages for malicious prosecution.

Sir Thomas Strangman K.C. replied.

March 26. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT. The question arising in this appeal is: At what stage will criminal proceedings instituted falsely and maliciously before a magistrate under the provisions of the Indian Code of Criminal Procedure, lay the foundation for a suit for damages for malicious prosecution?

[His Lordship stated the facts and cited the statutory provisions set out above and continued:] The first question which arises in this appeal is whether in *Golap Jan's* case (1) the correct principle was applied. The case has been followed in some courts in India and dissented from in others, and their Lordships will examine the position of the authorities. *Golap Jan's* case (1) was decided in the year 1911 by a Division Bench of the Calcutta High Court presided over by Sir Lawrence Jenkins,

(1) I. L. R. 38 C. 880.

(2) (1908) L. R. 35 I. A. 189.

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the Chief Justice. A complaint had been made before a magistrate by the defendant against the plaintiff of criminal breach of trust and the magistrate had referred the matter for inquiry by the police under s. 202 of the Code of Criminal Procedure, and, on receiving the report of the police, dismissed the complaint under s. 203 of the Code. The court held that in those circumstances no prosecution had commenced and accordingly no suit for malicious prosecution would lie. Reliance was placed by the court on the heading to ch. 17. "The commencement of proceedings before magistrates," and it was held that that stage had never been reached. The court also relied on the decision of the English Court of Appeal in *Yates v. The Queen* (1), where the learned judges expressed the view that a prosecution could not be said to commence before a person was summoned to answer a complaint. But in that case the court was not dealing with a suit for malicious prosecution. It had to decide the question when a criminal prosecution had commenced within the meaning of s. 3 of the Newspaper Libel and Registration Act, 1881.

Golap Jan's case (2) was followed in 1912 by a single judge in Madras in *Sheik Meeran Sahib v. C. Ratnavelu Mudali* (3). In the same year, namely 1912, in *C. H. Crowdy v. L. O. Reilly* (4), a Division Bench of the Calcutta High Court, consisting of Mookerjee and Beachcroft JJ., expressed the view that a suit for damages for malicious prosecution lay whenever the criminal law had been set in motion maliciously and without reasonable cause, and that it was not necessary to show that there had been a prosecution in the restricted sense in which that word is used in the Code of Criminal Procedure. To that extent, the reasoning in *Golap Jan's* case (2) was criticized, but it was distinguished on the facts, because in *Crowdy v. Reilly* (4) the complaint relied on as the foundation of the suit had not asked for the prosecution of the plaintiff but that security proceedings should be taken under s. 145 or s. 107 of the Code of Criminal Procedure, and the magistrate had not directed any inquiry.

In the year 1914 *Bishun Persad Narain Singh v. Phulman Singh* (5) came before a Bench of the Calcutta High Court consisting again of Mookerjee and Beachcroft JJ. In that case the complainant charged the plaintiffs with certain acts of a

(1) (1885) 14 Q. B. D. 648.

(2) I. L. R. 38 C. 880.

(3) (1912) I. L. R. 37 M. 181.

(4) (1912) 17 C. W. N. 554.

(5) (1914) 19 C. W. N. 935.

criminal nature and prayed that security might be taken from them, as otherwise his life and property would be in danger. The magistrate examined the complainant on oath, who gave evidence as to the incidents mentioned in the petition and prayed that proceedings under s. 107 of the Code of Criminal Procedure might be taken against the plaintiffs. The magistrate thereupon referred the matter to the deputy magistrate for inquiry and report. The deputy magistrate issued notice to the parties and examined a considerable number of witnesses. The deputy magistrate in due course submitted his report, and the magistrate in charge accepted the report and refused to proceed with the complaint. The facts in that case appear to their Lordships in substance to raise the same question as arose on the facts in *Golap Jan's* case (1), since although the complaint only asked for security proceedings to be taken, it alleged facts on which it would have been open to the magistrate to frame a criminal charge. The court, following their former decision, held that proceedings under s. 107 amounted to a prosecution for the purposes of a suit for malicious prosecution, and they further held that under the circumstances of the case the prosecution had commenced. The court was not prepared to accept the reasoning in *Golap Jan's* case (1) and expressed the view that the prosecution—that act of the prosecutor which renders him liable to be cast for damages if malicious, and not based on reasonable and probable cause—commenced when the prosecutor had taken the initial step, namely, had made his complaint to the magistrate. The learned judges further expressed the view that the action for damages for malicious prosecution was not a creature of any statute, and that it was wide of the mark to investigate the precise meaning of the expression “prosecution” in the Code of Criminal Procedure, or the exact point of time when a prosecution may be said to commence within the meaning of that Code.

Bishun Persad Narain Singh's case (2) was followed in *Gur Saran Dass v. Israr Haider* (3) by a Bench of the Chief Court of Oudh, where it was held that the essence of an action for malicious prosecution lies in the institution of criminal proceedings and their termination in the plaintiff's favour, and that the proceedings started with the issue of the complaint. The court disagreed with *Golap Jan's* case (1). The views expressed in *Bishun Persad Narain Singh's* case (2) were

(1) I. L. R. 38 C. 880.

(3) (1927) I. L. R. 2 Luck. 746.

(2) [1914] 19 C. W. N. 935.

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approved by Benches of the Calcutta High Court in *Narendra Nath De v. Jyotish Chandra Pal* (1), and in *Rabindra Nath Das v. Jogendra Nath Deb* (2), though those cases were distinguishable on the facts as they were concerned with applications for sanction to prosecute.

On the other hand, *Golap Jan's* case (3) has been followed by a Bench of the Patna High Court in *Subhag Chamar v. Nand Lal Sahu* (4), by a Bench of the Allahabad High Court in *Ali Muhammad v. Zakir Ali* (5), and by a Bench of the Rangoon High Court in *Gowri Singh v. Bokka Venkanna* (6).

If *Golap Jan's* case (3), which was decided thirty-six years ago, had met with general approval in India, their Lordships might have been prepared to accept it on the principle of *stare decisis*, but, as the above discussion shows, the case has not met with universal approval. Nor can it be said to lay down any principle which may have served as a guide to conduct in other cases. No man can be heard to say that he lodged a false complaint maliciously without any justification in the belief that, though supported by his own oath, the magistrate would have no difficulty in detecting its falsity and in dismissing it without calling on the accused. Their Lordships think it right, therefore, to examine the principle on which the case was based.

The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C.J. in *Savile v. Roberts* (7) that damages might be claimed in an action under three heads, (1.) damage to the person, (2.) damage to property, and (3.) damage to reputation, and that rule has prevailed ever since. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain

(1) (1922) I. L. R. 49 C. 1035.

(5) (1931) I. L. R. 53 A. 771.

(2) (1928) I. L. R. 56 C. 432.

(6) (1935) I. L. R. 13 R. 764.

(3) I. L. R. 38 C. 880.

(7) (1698) 1 Ld. Raym. 374.

(4) (1928) I. L. R. 8 Pat. 285.

classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1)). The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen L.J. in the last mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.

From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under s. 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaintiff alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment.

(1) (1883) 11 Q. B. D. 674.

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As already noted, the learned judge was prepared to allow Rs. 1,000 as special damage to property, but did not consider the question of damage to the reputation of the plaintiff, which the plaint assessed at Rs. 25,000. Before this Board, however, counsel for the appellant stated that he did not ask for more than nominal damages and was willing to accept such sum as the Board might award. The parties did not ask for a reference as to damages and in the circumstances their Lordships are prepared to take the course which was taken by the Board in *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (1) and to assess the damages themselves. They accept the figure of Rs. 1,000 which the learned judge would have awarded as special damage, and they assess general damage to reputation at Rs. 100.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that the decree of the Appeal Court dated February 1, 1945, be set aside, and that the decree of Gentle J., dated March 31, 1943, also be set aside, and that judgment be entered for the appellant against respondents 1 to 3 for the sum of Rs. 1,100. Respondents Nos. 1-3 must pay the costs of this appeal and of the appeal in India and half of the appellant's cost of the trial.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for first respondent : *W. W. Box & Co.*

(1) (1866) 10 Moo. I. A. 540.

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[PRIVY COUNCIL.]

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April 15.

ATTORNEY-GENERAL FOR PALESTINE APPELLANT ;
AND
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ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine — "Exportation" of goods — Construction — By land, sea or air—"Quay or other place"—"Other place" not ejusdem generis with "quay"—Import, Export and Customs Powers (Defence) Ordinance, No. 51 of 1939, s. 3, sub-s. 1; s. 5, sub-s. 1 (b).

Exportation from Palestine by any means—by land, sea or air—

* Present : LORD UTHWATT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

is within the ambit of s. 3, sub-s. 1, of the Import, Export and Customs Powers (Defence) Ordinance, 1939, of Palestine, and accordingly throughout the Ordinance "export," unless controlled by the context, includes export by land carriage. The meaning of "place" in s. 5, sub-s. 1 (b), of the Ordinance is not limited by the reference therein to "quay," and sea carriage alone is not inherent in the phrase "quay or other place," and therefore those words afford no context for limiting the meaning of "exported" in the sub-section to exportation by sea.

"Place" in s. 5, sub-s. 1 (b), is not confined in its application to a spot which possesses some characteristic other than locality.

Judgment of the Supreme Court of Palestine (1944) 11 P. L. R. 602, reversed.

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APPEAL (No. 43 of 1945) from a judgment of the Supreme Court of Palestine (December 1, 1944) which set aside a judgment of the District Court of Haifa (June 12, 1944) which had dismissed the respondent's claim for the return of certain goods or payment of their value.

The following facts and citation of the relevant statutory provisions are taken from the judgment of the Judicial Committee. The goods in question were claimed by the Government of Palestine (represented in the proceedings by the appellant, the Attorney-General for Palestine) to have become forfeited goods under the Import, Export and Customs Powers (Defence) Ordinance, 1939. The facts were not in dispute; the only questions for decision related to the proper construction of the Ordinance. The respondent, in September, 1942, bought certain goods in Palestine for export to Syria. He made no effort to obtain a licence for export. On September 18, 1942, the goods were loaded into two lorries which left Jaffa at 2 a.m. After by-passing Samakh, where there was a customs post, the lorries were stopped by the police about two hundred yards from the Syrian border and were then taken to Samakh, where the goods were seized. The District Judge who tried the case had no difficulty in drawing the inference of fact that the goods were being carried for purpose of export.

The more directly material provisions of the Ordinance as it stood amended at the date of the seizure of the goods were as follows: "3.—(1.) The High Commissioner may by order "make such provisions as he thinks expedient for prohibiting "or regulating, in all cases or any specified classes of cases, "and subject to such exceptions, if any, as may be made by or "under the order, the importation into, or exportation from,

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“ Palestine or any specified part thereof, or the carriage coast-
“ wise or the shipment as ships’ stores, of all goods or goods of
“ any specified description.

“ (4.) For the avoidance of doubt it is hereby declared that,
“ without prejudice to the provisions of the enactments relating
“ to customs with respect to ships and aircraft, the taking into
“ or out of Palestine of ships or aircraft may be prohibited or
“ regulated by an order under this section as an importation
“ or exportation of goods, notwithstanding that the ships or
“ aircraft are conveying goods or passengers, and whether or
“ not they are moving under their own power.”

“ (5.) (1.) If any goods—

“ (a) are imported, exported, carried coastwise or shipped
“ as ships’ stores in contravention either of an order under
“ this Ordinance or of the law relating to trading with the
“ enemy ; or

“ (b) are brought to any quay or other place, or water-
“ borne, for the purpose of being exported or of being so
“ carried or shipped in contravention either of an order under
“ this Ordinance or of the law relating to trading with the
“ enemy,”

“ those goods shall be deemed to be prohibited goods and shall
“ be forfeited ; and the exporter or importer of the goods or
“ his agent, or the shipper of the goods, shall be liable, in
“ addition to any other penalty under the Ordinance relating to
“ customs, to a penalty of two years’ imprisonment or a fine
“ of 500*l.* or both.

“ (2.) If any such order as aforesaid prohibits the exportation
“ of any goods unless consigned to a particular place or person
“ and such goods so consigned are delivered otherwise than to
“ that place or person, as the case may be, the vessel in which
“ the goods were exported shall be deemed to have been used
“ in the conveyance of prohibited goods.

“ (3.) If any goods are imported, exported, carried coastwise
“ or shipped as ships’ stores, or are brought to any quay or other
“ place, or water-borne, for the purpose of being exported or of
“ being so carried or shipped, a customs officer may require any
“ person possessing or having control of the goods to furnish
“ proof that the importation, exportation or carriage coastwise,
“ as the case may be, is not unlawful by virtue either of an order
“ under this Ordinance or of the law relating to trading with
“ the enemy ; and if such proof is not furnished to the satis-

"faction of the Director, the goods shall be deemed to be prohibited goods unless the contrary is proved."

"7.—(I.) For the purpose of securing compliance with the provisions of this Ordinance or any order made under s. 3 of this Ordinance or with any other Ordinance relating to the importation or exportation of goods or with the law relating to trading with the enemy—

"(a) a customs officer may at any time refuse clearance to any ship;"

"8.—(I.) Where a person about to export goods from Palestine, in the course of making entry thereof before shipment, makes a declaration as to the ultimate destination thereof, and the Director has reason to suspect that the declaration is untrue in any material particular, the goods may be detained until the Director is satisfied as to the truth of the declaration, and, if he is not so satisfied, the goods shall be forfeited.

"(2.) Any exporter or shipper of goods which have been exported from Palestine shall, if so required by the Director, satisfy him that those goods have not reached any enemy or any enemy territory, and if he fails so to do, he shall incur a penalty of treble the value of the goods or 100*l.* at the election of the Director, unless he proves that he did not consent to or connive at the goods reaching an enemy or enemy territory, and that he took all reasonable steps to secure that the ultimate destination of the goods was not other than that specified in the documents shown or furnished to the customs officers in connexion with the exportation of the goods."

Purporting to act under the powers conferred by s. 3 of the Ordinance the High Commissioner by the Licensing of Exports Order, 1940, prohibited the export of all goods from Palestine.

There was one provision of the Interpretation Ordinance which was relevant. That provision ran as follows: "26. Where the words 'or' 'other' and 'otherwise' are used they shall unless a contrary intention appears be construed disjunctively, and not as implying similarity, unless the word 'similar' or some other word of like meaning is added."

In those circumstances two main questions of construction were debated: first, whether or not the Ordinance when construed as a whole empowered the High Commissioner to prohibit export otherwise than by water; and second, whether, assuming it did, head (b) of s. 5 applied where export involving only carriage by land was in contemplation. A further point

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was raised by the respondent that the goods in question were not brought to a "place."

The District Judge (Judge Curry) took the view that the Ordinance regulated the import and export of goods into and out of the country whether it were by sea, land or air, and that to restrict the meaning of "other place" to places ejusdem generis with "quay" would not be giving effect to the obvious intention of the legislature as gathered from a general survey of the Ordinance.

The Supreme Court (Edwards and Frumkin JJ.) did not express any opinion on the general effect of the Ordinance but was content to rest its decision on a conclusion that "other place" must refer to some place near or close to or part of a waterside.

1947. Feb. 12, 13. *Gahan* for the appellant. The whole tenor of the judgment of the Supreme Court is contained in the words "we think that the words 'other place' must refer to 'some place near or close to or part of a waterside.'" It is submitted that that is a wrong approach to the question of construction. To construe "other place" as ejusdem generis with "quay" does violence to the obvious intention of the legislation, and ignores the ordinary rule of construction as laid down in such cases as *Allen v. Emmerson* (1). It is an unreasonable interpretation to confine "exportation" to export by sea. Moreover, the construction adopted by the Supreme Court is contrary to the construction of the like provision in the British legislation. In *Emerson v. Woods* (2) the court had to construe s. 3, sub-s. 1 (b), of the Import, Export and Customs Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 69), which provided that "if any goods— . . . are brought to any quay or other place, or waterborne, for the purpose of being exported" and it was held that there was no justification for giving the words "other place" a restricted meaning, and that those provisions of the United Kingdom Act applied to the bringing of goods to a place in Northern Ireland for exportation by land across the Eire border.

Le Quesne K.C. and *H. Goitein* for the respondent. It is accepted that in considering whether the ejusdem generis rule applies the Ordinance must be looked at as a whole, and also that regard must be had to the evil which the legislation was designed to meet. It would not be surprising, however, in all

(1) [1944] K. B. 362, 367.

(2) [1942] N. I. 118, 127.

the circumstances if the draftsman was concerned with exports by sea : there is nowhere any specific reference to exportation by land. The construction that has been put on the words "or other place" by the Palestine Supreme Court is quite a natural one. Those three words have in the section water on either flank—"quay" and "waterborne"—so it is natural that "other place" should have something to do with the proximity of water, and the observations of Asquith J. in *Allen v. Emmerson* (1) are by no means fatal to that submission. Next, and looking at s. 5, sub-s. 1 (b), as a whole, the right view is that the sub-section is concerned with goods in a place from which they will be exported ; it cannot mean any place anywhere in the country, for if that was so it was unnecessary to begin by bringing in the word "quay," and, indeed, it was not desirable that it should be introduced. There are at least three sections in the Ordinance which strongly support the view that it relates only to water routes : in s. 8 there is a definite reference to exporting by sea. It is not in the least likely that a man would have been able to export goods over land from Palestine in 1942 without making a statement of "ultimate destination." Those are strong indications that the purpose of this Ordinance was to deal with goods which were going to be exported by sea, and the significant thing about s. 3, sub-s. 1, and s. 3, sub-s. 4, which latter refers to aircraft, is the absence of any reference to land conveyance. The Ordinance should be construed against the Crown, not against the subject. [Reference was made to *Emmerson v. Woods* (2).] The conclusion reached by the court below was correct. We are not asking the Board to do anything that infringes against the Interpretation Ordinance, the ejusdem generis rule may be applied and at the same time the words treated as disjunctive.

H. Goitein followed, and referred to *Eldorado Ice Cream Co. v. Clark* (3).

Gahan replied. On its proper construction and in its general scope the Ordinance applies to all export of goods from Palestine, whether by land, sea or air. It is impossible to construe s. 3, sub-s. 1, as relating only to transit by sea into or out of that specified part of Palestine—it might be landlocked. Section 3, sub-s. 4, also shows that the draftsman could not have been confining his attention to export by sea, and that he also had in mind air transport of goods. There may be

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(1) [1944] K. B. 362.

(3) [1938] 1 K. B. 715, 721.

(2) [1942] N. I. 118, 128.

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many perfectly good reasons for restricting the provisions in s. 5, sub-s. 2, to a sea-going vessel. The word "exportation" in the Customs Ordinance is used for taking goods anywhere by any means. The fact that in s. 5, sub-s. 1 (b), the words "other place" are sandwiched between "quay" and "waterborne" does not imply that the other place must be a place in connexion with export by water. The words "other place" really come in their natural place, and if it is right that the Ordinance deals with all exportation, s. 5 would be a curious gap in the scheme of the legislation if the argument for the respondent is right. The test of "place" is whether goods were brought there with the intention of contravening the order that was made under s. 3, sub-s. 1. The *Eldorado Ice Cream* case (1) turns on its special facts and is entirely distinguishable.

April 15. The judgment of their Lordships was delivered by LORD UTHWATT, who stated the facts and referred to the statutory provisions set out above and continued: Their Lordships have come to the conclusion that the views expressed by the District Judge are correct. The first matter to be determined is the general scope of the Ordinance. The respondent contended that, as a matter of construction, the powers of the High Commissioner under s. 3, sub-s. 1, as regards exportation, extended only to making orders prohibiting or regulating exportation by sea. It was argued that a consideration of this Ordinance as a whole and, in particular, the terms of head (b) of s. 5, sub-s. 1, of s. 5, sub-s. 2, and ss. 7 and 8, showed that export by sea alone was under consideration, and that s. 3, sub-s. 1, should accordingly receive a limited construction. For the purposes of considering this argument their Lordships are content to assume that head (b) of s. 5, sub-s. 1, applies only to export by sea. As regards s. 5, sub-s. 2, it is clear that read strictly it proceeds on the footing that, where goods are exported, a vessel is concerned. The provisions of s. 7, sub-s. 1, do not aid the respondent's argument, for the existence of a particular provision relating to ships carries the point no further. Section 8, sub-s. 1, is of more assistance to the respondent by reason that it assumes that an entry before shipment will be made whenever goods are about to be exported from Palestine. Their Lordships express no opinion as to the effect of s. 8, sub-s. 2, but again are content to assume in favour of the respondent that it applies only to goods shipped by sea. The conclusion of the respondent was that on giving due weight

(1) [1938] 1 K. B. 715.

to the language and substance of these provisions, the proper inference was that as regards exportation export by sea alone fell within the contemplation of s. 3. That section should as a matter of construction be limited accordingly. The Ordinance would in light of Palestine's land frontiers be somewhat whimsical in character, but that, it was argued, was no reason for attributing to the Ordinance a construction repelled by its terms.

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In their Lordships' view the argument proceeds on a false basis. The substantive provision is contained in s. 3. All the provisions on which the respondent relies (other than s. 8) are provisions which are ancillary either to s. 3 or to some other enactment. Section 8 is an independent provision. Their Lordships do not doubt that if s. 3, sub-s. 1, was not clear in its intendment, resort might legitimately be made to ancillary provisions related to s. 3, sub-s. 1, to determine its proper meaning and to resolve any ambiguity. But the language of s. 3, sub-s. 1, is clear, unambiguous and sweeping. There is nothing in it to suggest that there is any limitation on the extent of the power to prohibit importation or exportation. There is, indeed, nothing in it to suggest that methods of export are being considered or dealt with at all. These circumstances taken alone are sufficient to preclude a gloss limiting the power to prohibit export to a power to prohibit export by sea carriage. The matter does not, however, rest there. First, a gloss cannot be put on exportation without putting the same gloss on importation, for the two matters are in the section dealt with together, and there is nothing in any part of the Ordinance to suggest that importation by sea alone is in view. Second, under the Act exportation from, or importation into or from, a part of Palestine may be prohibited. A land-locked part of Palestine might be selected as an area subject to restrictions on importation and exportation, and obviously sea carriage would then be out of the question. And lastly sub-s. 4 "for the avoidance of doubt" declares that an order under s. 3, sub-s. 1, may prohibit the taking out of aircraft moving under their own power. The inclusion of any means of export is therefore clear. The result is not that the ancillary provisions suggest a qualification on the terms of s. 3, but that some of the ancillary provisions come under the stigma of ineptitude or of incompleteness. Their Lordships are therefore of opinion that exportation by any means is within the ambit of s. 3, sub-s. 1, and that therefore throughout the Ordinance

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The next question is the proper construction of head (b) of s. 5, sub-s. 1. The contention of the respondent is that head (b) is confined to "the bringing of goods to a quay or other like place for the purpose of being exported by sea." This contention has to be examined on the footing that the word "exported," unless controlled by the context, is quite general in its signification. It is beyond question that in head (a) of s. 5, sub-s. 1, the word "exported" is not confined in its application to export by sea. No reason can be assigned for putting a limitation on its general scope. Head (b), on its general intendment, picks up the references to export, carriage coastwise and shipping as ships' stores contained in head (a), with the result that the phrase "If any goods are brought to any quay or other place for the purpose of being exported"—and it is the phrase that has to be construed, not particular words contained in it—has to be looked at in light of the general signification of the word "exported." Once the question is stated, the answer is apparent, when the provision of the Interpretation Ordinance quoted above is borne in mind. The meaning of "place" is not limited by the reference to "quay," and the suggestion that sea carriage alone is under contemplation is not inherent in the phrase "quay or other place." The words "quay or other place" afford therefore no context for limiting the meaning of "exported." In their Lordships' view, therefore, head (b) of s. 5, sub-s. 1, applies where goods are brought to a place for the purpose of export by land.

The remaining question is whether "place" is confined in its application to a spot which possesses some characteristic other than locality. Their Lordships see no reason for accepting any such limitation.

In the result, therefore, the goods were, in their Lordships' view, duly forfeited according to law. Their Lordships will humbly advise His Majesty that the appeal be allowed. The respondent will bear the cost of this appeal and of the proceedings in the Supreme Court.

Solicitors for appellant : *Burchells.*

Solicitors for respondent : *Bartlett & Gluckstein.*

Followed. BROCK v.
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[1951] 1 K. B. 529

[HOUSE OF LORDS.]

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	AND	
WALLBANK	RESPONDENT.	Oct. 24, 25; Dec. 16.

Animals — Negligence — Highway — Straying from adjoining fields — Liability to fence.

The owner of a field abutting on the highway is under no prima facie legal obligation to users of the highway so to keep and maintain his hedges and gates along the highway as to prevent his animals from straying on to it nor is he under any duty as between himself and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from straying on to the highway.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (MacKinnon, Morton and Lawrence L.JJ.).

The facts, summarized from their Lordships' opinions, were as follows: On April 1, 1944, at 1.30 a.m. the appellant, a miner working as a chargeman packer earning 9*l.* 10*s.* a week, was riding his pedal bicycle downhill along a public highway, known as Boulter's Lane Hill, Baddesley, in the county of Warwick. There was no evidence as to the speed at which he was travelling or as to the width or nature of the lane but he said in evidence that the slope was steep. His front light was masked in accordance with the black-out regulations, since it was war-time, and he also had a back light. It was dark and he estimated the visibility at one hundred yards. The lane was bounded on each side by hedges or fences. The appellant said in evidence that the hedge was thick at the side of the road running past the respondent's farm. At this point the appellant met with a serious accident. According to the judge's note, he collided on the highway with a horse belonging to the respondent and, being thrown to the ground, was badly injured. The horse had apparently escaped from a field where the respondent had placed it. It was not clear from the evidence whether it dashed across the road and collided with the appellant or whether, because of the dimness of his light, he failed to see it and ran into it. The appellant sued the respondent in

*Present: VISCOUNT MAUGHAM, LORD THANKERTON, LORD PORTER, LORD UTHWATT and LORD DU PARCQ.

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Atherstone county court for damages "for negligence and/or nuisance and/or breach of statutory duty," contending that he was liable because, as a reasonable man, he ought to have realized that to put a horse into a field adjoining the highway, with a gap in the hedge, would enable it to escape and so might endanger those using the highway and in particular he ought to have foreseen the possibility of danger on a dark night, with black-out regulations in force. In examination-in-chief the appellant said, according to the judge's note, that he was "twisted over by horse. Saw horse standing on top. He came from defendant's." In cross-examination he said: "I first saw horse standing on top of me. I saw it dashing out from the side of me. No signs of vicious behaviour. Light chestnut. Saw colour by lamp. I recognized the horse straight away." He also said in cross-examination what he had not said in chief that the fence was dilapidated and that there were gaps through which a horse could get. In re-examination he said that there was a space between the gate-stump and the hedge. There was not any evidence that a gap or gaps existed before the horse escaped or that the respondent either knew of any such defects or might reasonably have discovered them. The respondent in evidence said that there was in the field a brown horse, 30-35 years old, used on the milk round. He said, according to the judge's note: "Night of accident seventeen beasts and two horses in field. Kept there every night. Never had horse or cow escape from that field." He said that there was no gap in the fence to his knowledge. He also disputed that the horse which injured the appellant was his. The judge, in his judgment, according to the notes made by the solicitor on one side and by counsel on the other, after stating that he did not believe the respondent, said that the horse was on the road and that the respondent "collided with it and was thrown to the road." He found as a fact that it was the respondent's horse and added: "It got on to the road because the fence was defective." These were his only findings. He held, following *Heath's Garage, Ltd. v. Hodges* (1) and *Hughes v. Williams* (2), that there was no duty on the respondent to maintain his fences and consequently that there was no negligence on his part; he accordingly dismissed the action. He stated, however, that in case his judgment was held, on appeal, to be wrong, he assessed the damages at 200*l.* The Court of Appeal dismissed the appeal

(1) [1916] 2 K. B. 370.

(2) [1943] K. B. 574.

of the appellant, who appealed to the House of Lords as a poor person. H. L. (E.)

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R. T. Paget and *S. Silkin* for the appellant. It is not suggested that the House of Lords should enter judgment for the appellant. The case should go back to the county court to be investigated anew on the issue of negligence. This the judge did not do because he felt himself bound by the authorities to find for the respondent. Accordingly there should be a new trial. The appellant relies on the following propositions:

(a) The general rule of law in negligence is that where A. does something which, as a reasonable man he ought to realize will endanger B. and B. in fact suffers damage of the type which A. ought to have contemplated, then B. can recover and in so far as the authorities purport to give the owners of land adjoining highways an immunity from the ordinary law in negligence, they have either been misunderstood or are wrongly decided.

(b) If A. puts a domestic animal into a place in which he ought in reason to realize that it will by its mere presence endanger others, he is responsible to B. if B. in fact suffers damage of the type which A. ought to have contemplated. If A. drives a horse across the red traffic light and injures B. who is crossing by the green light he is responsible to B., not because of any vicious propensity of the horse, but because he put a tame, kindly horse into a position in which it endangered others. There may be circumstances in which putting a horse in a particular place is negligent; the negligent act of which the appellant complains is turning a horse into a field with defective fences.

(c) The judge was wrong in holding that he was precluded in law from finding for the appellant. On the contrary, he should have considered whether, having regard to the circumstances of this case and in particular to the state of the fencing and to the black-out regulations then in force, the respondent had put his horse into a place in which he ought in reason to have realized that it was likely to endanger traffic on the road. As to the statutes (Highway Act, 1835, s. 74, and Highway Act, 1864, s. 25), these are only relied on by the appellant in so far as they give an indication of the measure of care required from owners of land adjoining the highway and of their duty not to let cattle stray thereon. The principle to be applied is that no one must do a thing which, as a reasonable man, he should realize must endanger others. Negligence is of two types:

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at all times to every other man to refrain from acts which he must realize, as a reasonable man, will be unreasonably dangerous to others, and (b) omission to do acts which it is a man's duty to perform for the protection of others; see the American Restatement of the Law, (Torts), vol. II, s. 284. The test of the duty is what a reasonable man ought to anticipate before doing the act. The duty arises from the anticipated danger; see *Donoghue v. Stevenson* (1). If a farmer keeps his fences dilapidated he should not put his horse in a field, particularly one adjoining a road with traffic and particularly at night. A man who turns an ordinary horse into a field with an ordinary fence would not expect the horse to jump out, even though it could, but if there is a gap in the fence he ought to anticipate that the horse will walk out. The duty on the respondent was not to keep his fences in order but to refrain from turning animals into a field of which the fences were not in order. It was the combination of the horse and the dilapidated fence that was culpable. Having shown a gap and an escape, the appellant has established a prima facie case. Fences along a road make drivers believe that cattle will not stray and also hides cattle from drivers. Accordingly in those circumstances it is more dangerous than it would otherwise be to let cattle go loose, and a defective fence is more dangerous than no fence at all. Thus, the owner must see that it is in fact secure. The respondent ought to have known that there were gaps in this hedge and on the evidence he did an act which unreasonably endangered persons passing on the unlighted highway, by reason of the natural tendency of horses to blunder about. If, in breach of the duty not to endanger others, a man lets his horse escape on to the road and by behaving naturally it causes damage, he is liable, but if it causes damage by behaving abnormally, he is not liable, because the consequences are too remote. There is a distinction to be drawn between animals which are normally allowed to be loose and those which are normally kept under control; see the American Restatement of the Law (Torts), vol. III, s. 518. It is unusual for horses to be left loose on the highway by night. The horses of gipsies by the roadside are usually hobbled. The owner of an ordinary horse is bound to keep it in. One of the most ancient wrongs is allowing cattle to stray. There is no general rule that there is no duty on the owners of land adjoining the highway to prevent cattle from straying on it nor is there any absolute liability on

(1) [1932] A. C. 562, 580.

them if they fail to prevent it, for then no question of negligence could arise. If there had been a general rule that there is no duty to prevent animals escaping on to the highway, the basis of the argument in *Cox v. Burbidge* (1) would not have existed, since, if there was no duty to fence, then, whatever a horse might do, its owner could not be liable unless it was known to be vicious : see also *Brackenborough v. Spalding Urban District Council* (2). The court must look at the particular circumstances in each case, the traffic conditions, whether it is light or dark, whether it is in town or country, whether or not the roads are fenced. Things may be dangerous or not dangerous at different times. Generally speaking the problem is a modern one, for straying cattle can hardly have been a danger on the highway before the invention of the fast-moving bicycle. Previous authorities have recognized the possibility of a duty being owed by the owner of a field to users of the highway in such circumstances as these. *Heath's Garage, Ltd. v. Hodges* (3) was wrongly decided. On a full consideration of the authorities cited therein and in *Hughes v. Williams* (4) the respondent was guilty of negligence. *Hadiwell v. Righton* (5) does not touch the present case, since the real basis of the decision was that no one could have anticipated that the fowls being on the highway would endanger anyone. [They also referred to *Brown v. Eastern & Midlands Ry Co.* (6) ; *Higgins v. Searle* (7) ; *Ellis v. Banyard* (8) ; *Jones v. Lee* (9) ; *Turner v. Coates* (10) and *Deen v. Davies* (11).]

Beney K.C. and *Abraham Flint* for the respondent, were not called on to argue.

The House took time for consideration.

Dec. 16. VISCOUNT MAUGHAM. My Lords, the judge in his judgment, according to the notes kept by the solicitor on one side and by counsel on the other, after stating that he did not believe the defendant, said concisely that the horse was on the road and that "the plaintiff collided with it and was "thrown to the road." He found as a fact that it was the defendant's horse and added : "It got on to the road because

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| (1) (1863) 13 C. B. (N. S.) | (6) (1889) 22 Q. B. D. 391. |
| 430, 435, 436. | (7) (1909) 100 L. T. 280. |
| (2) [1942] A. C. 310, 315, 317, | (8) (1911) 106 L. T. 51. |
| 321. | (9) (1911) 106 L. T. 123. |
| (3) [1946] 2 K. B. 370. | (10) [1917] 1 K. B. 670. |
| (4) [1943] K. B. 574. | (11) [1935] 2 K. B. 282. |
| (5) [1907] 2 K. B. 345. | |

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"the fence was defective." Your Lordships will, of course, accept these findings though the last finding was apparently a conjecture. The learned judge held, following the decided cases and in particular *Heath's Garage, Ltd. v. Hodges* (1) and *Hughes v. Williams* (2), that there was no duty upon the respondent to maintain his fences and consequently that there was no negligence on his part and he accordingly dismissed the action. He stated, however, that in case his judgment was held to be wrong, he assessed the damage at 200*l.* The appellant appealed to the Court of Appeal contending that the judge was wrong in law in holding that there was no duty on the part of the respondent so to fence his land as to prevent his horse from straying upon the highway. The appeal was dismissed after a hearing by MacKinnon, Lawrence and Morton L.J.J.; but they thought fit to give leave to appeal to this House, apparently because of some expressions of opinion in *Hughes v. Williams* (2) to the effect that the state of the law laid down by the older authorities was not very satisfactory having regard to modern conditions. I must observe that in giving leave to appeal, in what is considered to be a test case, the position of the respondent as to costs, if the appeal should fail, ought to be borne in mind. It is an unfortunate fact for the respondent in this case that the appellant presents his appeal as a poor person.

My Lords, I have had the advantage of reading the judgments of my noble and learned friends, Lord Porter and Lord du Parc, in which the previous authorities are carefully examined and the facts of this case are fully dealt with; and, to avoid repetition, I propose to deal with each of the questions of law involved as if it were coming as *res integra* before your Lordships. As I apprehend the matter, there are two possible questions that arise. First, was the respondent, as the owner of a field or fields abutting on the highway, under a *prima facie* legal obligation to users of the highway so to keep and maintain his hedges and gates (if any) along the highway as to prevent his animals from straying on to it? Secondly, assuming there is no such general duty, was he under a duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on to the highway? I should say here that I do not propose to deal with the question which would arise if the animal is wild by nature or is a domestic animal known to be dangerous; though I may observe that in such cases I can readily conceive

(1) [1916] 2 K. B. 370.

(2) [1943] K. B. 574.

that the possibility or probability of danger to passers-by might impose a duty of reasonable care.

My Lords, light will be thrown on both the above questions by a consideration of the history of the growth of our highways, in order to see whether there was at any time such a state of things that a legal obligation on the owner or occupier of roadside lands to repair and maintain the adjacent hedges may reasonably be inferred, or any such duty towards users of the roadway can be established as to render such owner or occupier liable in an action for negligence should a horse or other animal belonging to him stray on to the road and cause damage to a passer-by. I do not think that the history of English roads has ever been exhaustively written ; but a great deal is known about them, and in comparatively recent times is to be found in a large number of private and public Acts of Parliament, particularly those in relation to inclosure. It was only by a very slow and gradual process extending over centuries that the forests and chases mainly belonging to the King which covered great tracts of land were disafforested, that the commons and wastes of different kinds were inclosed and that the fens and marshes were drained. Even as late as the year 1700 about one-half of the arable land of England was cultivated on the traditional open-field system where there were intermixed strip holdings with the benefit of common rights in pasture and waste. (See *Historical Geography of England before 1800*, edited by H. C. Darby, Cambridge, at p. 469.) Whilst England was largely covered by royal forests (not by any means all woodland), heaths, downs, fens, marsh, and above all by commons, wastes and common fields, there can have been few roads except tracks for the use of commoners and local inhabitants of the vils or townships. Until inclosure was effected roads or ways could not be made since either the landowner or the lord of the manor or persons with common rights would have objected. Before dealing with the vast inclosures which altered the face of England it is important to observe that such roads or tracks as there existed between market towns were almost completely uninclosed by hedges or fences. The fact is established by the interesting Act, 13 Edw. I. (A.D. 1285 Statute of Wynton, cap. 5.) It has come down to us in these terms : " Highways leading from one market town to another, " shall be enlarged . . . so that there be neither dyke, tree, " nor bush whereby a man may lurk to do hurt, within two " hundred feet of the one side and two hundred feet of the other

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"side of the way." This Act was not repealed till the Act, 7 Geo. III., c. 42 (s. 57) came into force. The Act of Edward I. probably became obsolescent as the countryside became less infested with rogues and vagabonds, who largely if not mostly consisted of men who were discharged soldiers and sailors without means of support. That change must have been after the reign of Queen Elizabeth, who would do nothing for such persons. But the Act remained on the statute book for over five centuries, which seems to show that there was no real demand for hedges along the roads. (See also the general Highways Act, 13 Geo. III., c. 78.)

Coming now to inclosures it will be remembered that the break-up of manors was a process which continued from roughly 1300 to 1485. The Lords aimed at increasing their inclosures and they were empowered to do so by the Statute of Merton (20 Hen. III., c. 4) and the amending Statute of Westminster (13 Ed. I., c. 46), provided they left enough pasture for persons with grazing rights. They also inclosed the desmesne lands. Different forms of inclosure subsequently took place which resulted in the break-up of the old village and manorial systems of cultivation; but many open-fields and commons continued to exist in and after 1793 when an Act was passed to deal with the matter. Inclosures were constantly sanctioned by private Acts and it is calculated that they numbered no less than four thousand in the eighteenth and nineteenth centuries. (Williams on Rights of Common, 1880, at p. 249.) A general Inclosure (Consolidation) Act was passed in the year 1801 consolidating provisions usually inserted in private Acts of Inclosure. The total amount inclosed since inclosure began was very great. Forests were also inclosed to a great extent, particularly after the Act, 16 Car. I., c. 16, relating to forests, came into force.

When inclosure took place and the wastes and other lands were divided up between lords and commoners, it became very desirable and often essential to do a good deal of road-making and fencing, and the general Inclosure Act of 1801 and the amending Inclosure Act of 1845, contain provisions on the subject. Both the Acts gave power (to the commissioners by the first Act and to the valuer by the second) to set out and make public roads and ways and to alter them, and, after providing that carriage roads so set out should be well and sufficiently fenced on both sides by such of the persons interested as the commissioners or the valuer should direct,

enacted that the roads were to be repaired by the inhabitants after certificate by two justices of the peace that the roads had been sufficiently formed and completed, but there was no provision as to upkeep of the fences. (See 41 Geo. III., c. 109, s. 9, 8 & 9 Vict., c. 118, ss. 65, 66 and 67.) It is a fair conclusion that the absence of any provisions in a multitude of Acts for the repair and maintenance of hedges or fences beside the roads by the owners of the adjoining lands is ground for thinking that the legislature had no intention of imposing any such liability. I should add that the early Highways Act mentioned above and the Highway Act, 1835, made provision for the cleansing of the ditches beside the highways and for the cutting back of hedges extending over the roads, but made no mention of the upkeep or repair of the hedges. Railway companies, however, for obvious reasons were an exception. (See Railways Clauses Consolidation Act, 1845, s. 68.) In 1663, the first turnpike trust was established (15 Car. II., c. 1). By 1760, turnpike roads covered the land. Between that year and 1800 well over a thousand turnpike Acts were passed. In 1864, the power of refusing the renewal of turnpike Acts was transferred to a Select Committee of the House of Commons and roads were then dis-turnpiked at the average of one thousand five hundred miles a year. The whole burden of repair of the roads then fell on the locality. A liability was imposed on the owners of the hedges to prevent them from interfering with the roads, but there was no obligation to maintain them.

I have summarized these facts—to which many others could easily be added—to show that the great majority of our roads were necessarily laid out piecemeal during long periods on hitherto uninclosed lands. Even at the present time very long stretches of highway are alternately inclosed by fences or hedges on one side or both sides or are quite uninclosed. (An interesting map showing the position not very long ago will be found in *The Woodlands and Marshlands of England*, by H. A. Wilcox (Hodder and Stoughton).) The process depended on the circumstances to which I have already referred and their gradual effect. There was no duty imposed as to repair of hedges or fences. It is obvious that the roadside owner who puts up no fence would not be under any duty to passers-by on the roads as regards horses and cattle. That is admittedly the case at this day in relation to roads over uninclosed land. On what principle can such a duty be imposed on one who chooses to erect a fence with a view to keeping out trespassers,

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or in an endeavour to prevent his cattle and horses from straying? It should be borne in mind that the roads of England until the days of Telford and Macadam were often in a shocking state. A vigorous account of them is given in the celebrated third chapter (State of England in 1685) of Lord Macaulay's History of England. In the seventeenth century apart from a few main roads they were often mere tracks used by pack animals. There are still plenty of green lanes and not a few bridle paths in the country which technically are highways. Would the suggested duty apply to the owners of lands on the sides of green lanes or bridle paths? There are also roads in some places so precipitous and so badly made that a motorist uses them at his peril and cyclists are almost compelled to walk their cycles. Would the owner of adjacent lands be under any liability to adventurous drivers and riders of that kind? It must, of course, be remembered that a man has long been prima facie liable if his cattle or horses, by his negligence, stray upon the land of another and there tread down his corn or damage his herbage (Blackstone's Commentaries, 21st ed., vol. 3, p. 211). The law in a remote past gave the owner or occupier of the land on which the trespass took place a special remedy by what used to be called distress damage-feasant, namely, a right to detain the animal in a place of detention called a pound to which the owner could have access in order to give the animal food and water. The practice of impounding such animals grew up, and public pounds existed in most villages. (Viner's Abridgement, tit. Distress (A); Blackstone's Commentaries, 21st ed., vol. I., p. 297.) As a public institution the pound was commonly referred to in our literature of a hundred years and more ago and added to our language. I hope that a good many people recollect that in perhaps the most celebrated of English novels, Mr. Pickwick was removed by Captain Boldwig to the village pound under the imputation of being a drunken plebeian. The right of impounding was the subject of a series of Acts of Parliament, of which the Statute of Marlborough (52 Hen. III., c. 4) was not the first, and was the cause of a number of decisions which will be found in Viner's Abridgement under the title "Distress." The Highway Act, 1835, and the amending Act, 1864, dealt with the matter so far as it affected surveyors of highways. But these various Acts and the provisions in them obviously give no assistance to the appellant; since he has no right founded on trespass, but has a mere right of passage over the road: see *Cox v. Burbidge* (1).

(1) 13 C. B. (N. S.) 430, 435.

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The roads were laid out largely for the benefit of owners of adjacent land including farmers. No one supposes that cattle and horses can be driven to market except on a road. Road users are expected to exercise at least reasonable care in passing animals in such cases. Further, there are roadside strips beside enclosed roads in many parts of the country which form part of the highways, and horses may often be seen grazing on such strips by leave of the owners of the soil. They do not seem to interfere with any reasonable use of the roads. Obviously road users cannot expect to have roads kept clear of animals.

For these reasons I conclude that the first question I have formulated above must be answered in the negative; and I did not understand that counsel for the appellant in his careful argument contended to the contrary. In the absence of any general duty to repair hedges we now come to the second question which is based on the alleged negligence of the respondent.* The established rule is that negligence must depend on failure to perform a duty of reasonable care to the class of persons of whom the plaintiff is one. In this case, the duty must be to exercise reasonable care to avoid an act or omission which would be likely, in the view of a reasonable and prudent man, to injure such a person as a cyclist or a motorist using the road beside the land of the respondent.* (*Donoghue v. Stevenson* (1), and cases there cited.) The very curious nature of the facts in that decision must not make us forget that mere possibility of accident is not enough to establish liability; otherwise the many decisions as to accidents to persons caused by domestic animals (in the absence of scienter) would have been differently decided.

My Lords, it is not irrelevant to observe that the suggested duty of the occupiers of inclosed land to the users of an adjoining highway ought to be capable of a definition intelligible to ordinary men. Is it to extend to hedges along roads such as green lanes, bridle paths, or other roads which have seldom or never been made up? Does it apply to roads which are rarely or never used by fast traffic? The height of the hedges ought to be mentioned, for it is obvious that young horses are often capable of jumping without difficulty over many of the existing hedge-rows as well as over the existing gates. The practice of hunting is sufficient evidence of that fact, if evidence were needed. Then the question arises as to what animals the

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owner is required as a matter of duty to fence in? It is admitted that dogs, cats, pigs and fowls cannot be prevented from straying by ordinary quickset hedges, yet accidents from their presence on roads must, I should suppose, be more frequent than those arising from straying horses or cattle. Then one must ask what standard of care is required from farmers and others? Gaps in hedges of course do constantly arise; but many of them are due to trespassers in attempting short cuts or on a mere country ramble or in search of mushrooms or blackberries. Gates are constantly left open by horse-men or by persons legitimately visiting a house or farm. We see every day in the country the request, "Please shut this gate," but we often see the gate in question left open. A good owner of land has been in the habit of attending yearly to the operation of hedging and ditching. In war-time it was often impossible to provide the necessary labour. Even in peacetime it would scarcely be reasonable to require a farmer to examine from day to day whether there was a gap or a thinning of a hedge through which a horse, a sow, or a bullock could force its way, and, if so, immediately to repair it. And it is plain that the liability for negligence of the owner of animals straying on a road must be subject to the condition that the road user himself must exercise reasonable care in driving or riding along the road. There is, I believe, no record before recent times of any accident between a vehicle of any kind and an animal straying from and adjoining an inclosed field on to a road. It is only since cycles and motor-cars began to move along our roads at speeds generally unthought of a hundred years ago that there has been any chance of such collisions. That they have been more common of late on uninclosed roads over open heaths and the like is demonstrated by the notices we often see in such places warning the motorist to "Beware of cattle." The absence of accidents between vehicles and stray animals was certainly not due to the absence of the latter. The fact is, as the desuetude of the village pound shows that "estrays" or "strays" were far commoner a hundred years ago. The above considerations seem to me to be conclusive to show that no such duty to road users as the appellant relies on could possibly have existed before the advent of fast traffic on made-up roads. Hedges and fences were generally constructed and maintained in the interests of the owners of adjacent lands, and accidents to road users arising from the animals straying on the roads were so far as

one can judge practically non-existent. Since fast traffic on such roads became usual, accidents due to straying animals no doubt sometimes occur; but so far as we know they are exceedingly rare. Moreover, they also arise when animals are being led or driven along highways in the usual course of husbandry, and no one suggests that motorists and cyclists have a *prima facie* right of action against the person in charge of them. More frequently such accidents are caused by dogs or fowls which can get through or over any ordinary hedge, and counsel for the appellant admitted, and I think rightly, that no action would lie in such cases against the owners. No facts in my opinion have been established which would tend to show that farmers and others at some uncertain date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists and others which never previously existed. ✕ The fact that the duty does not exist if the road is uninclosed by fences and yet that accidents are rare is, I think, strong to show that the respondent was not bound as a reasonable man to think that his failure to fill up a gap in his fence was likely to cause such an accident as the one which took place.

My Lords, I have dealt with the matter at some length owing to my respect for the doubts expressed by some eminent judges which seemed to call for an elaborate consideration. The arguments before your Lordships based on alleged negligence by the respondent might have been more shortly dealt with on the ground that the case as presented in the county court was not really founded and fought on that ground; and counsel for the appellant therefore thought it right to limit his claim to a request for a new trial. I have however thought it best to express my opinion without regard to a point which savours of technicality. In the result I am of opinion that the appeal fails and must be dismissed, and I move your Lordships accordingly.

My Lords, I have been requested by my noble and learned friend, LORD UTHWATT, to say that he concurs in the judgment which has been proposed.

LORD THANKERTON. My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the woolsack, and I also concur in the opinions about to be delivered by my noble and learned friends Lord Porter and Lord du Parcq, which I have had an opportunity of considering in print.

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LORD PORTER (read by LORD THANKERTON). My Lords, the relevant facts in this case can be very shortly stated. The appellant, who was plaintiff in the action, was riding his bicycle at night on a public highway bounded on each side by fences. It was dark and, being in time of war, black-out regulations were in force. In these conditions he came into collision with a horse, belonging to the respondent, which had escaped from a field in which he had placed it. It is not clear from the evidence whether the horse dashed across the road and collided with the appellant or whether, because of the dimness of his lights, he failed to see it and ran into it. I do not think it material to determine which version is the true one but if it had to be decided the former version appears the more likely. There was evidence that the fence between the field in which the horse was placed and the road had gaps in it—at any rate there was a gap between the gate stump and the hedge—and the learned county court judge who tried the case has found that the fence was defective and that this was the means by which the horse got on to the road. He also said that he did not believe the respondent, but one of the matters in dispute was whether the animal was the respondent's horse and this finding appears to deal with the respondent's allegation that it was not his. In these circumstances the appellant sued the respondent, alleging him to be liable because as a reasonable man he ought to have realized that to put a horse into a field adjoining the highway, with gaps, or at any rate a gap, in the hedge, would enable it to escape and so might endanger those using the highway and in particular ought to have foreseen the possibility of danger on a dark night with black-out regulations in force.

My Lords, on this evidence even if one is to assume that the respondent was under a duty to fence his land, I should not be prepared to hold that negligence was established. The respondent stated in the witness box that he was not aware of any gaps and there is not in fact any evidence that a gap or gaps existed before the horse escaped. There were seventeen beasts and two or three horses in the field on the night in question. The horses were kept there every night and according to the respondent's evidence neither they nor the cattle had been known to escape. I doubt whether it would be expected that they would do so at night even if there were gaps in the hedge, and still more do I doubt whether it should have been foreseen that a horse's mere presence on the highway would lead to an accident. If, as may be the case, the horse came down from

the bank on top of the cyclist the accident was an unusual one ; if on the other hand the cyclist ran into the horse, I think that the accident would be equally unexpected : it would be supposed that those passing along the highway would be able to see the horse, even in black-out conditions, in time to avoid a collision.

" A person on the highway," said Buckley L.J. in *Higgins v. Searle* (1) " is exposed to the ordinary risks taken by those " using the highway and if an accident happens owing to those " risks, to my mind, no legal consequence follows." Similar observations had already been made by Blackburn J. in *Fletcher v. Rylands* (2), approved in *Rylands v. Fletcher* (3), and by Cozens-Hardy M.R. in *Higgins v. Searle* (4). For these reasons I should think the appellant disentitled to recover, but the case was brought to your Lordships' House presumably to test the obligation of a landowner or tenant occupying land abutting on the highway to keep his beasts off the highway or at any rate to exercise reasonable care to do so and it is perhaps desirable to express some view as to this wider question. In *Brackenborough v. Spalding Urban District Council* (5) Lord Wright suggests that the rule that the owner or occupier of land adjoining the highway is under no duty to prevent animals escaping on to the highway is a modern one and that its limits are still uncertain, and points out that it was not relied on by the judges forming the court which decided *Cox v. Burbidge* (6). The appellant relied on this statement and the argument as I understand it was that if this rule had been recognized when that case was decided, the basis for discussion in that case would never have existed in as much as if there was no duty to fence, then, whatever the horse might do, its owner could not be liable unless it was known to be vicious. It is indeed true that no mention of the doctrine is made in that case, but I myself should read the judgments of Williams and Willes J.J. as confining the duty of owners of horses and cattle to keeping them from trespassing on the land of others to its hurt and as giving no ground for action against the owners of beasts which do injury to persons on the high road unless they are known to be vicious. Erle C.J. and Keating J. decide merely that in order to establish liability on the part of the owner of an animal of a tame species it is necessary to show

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(1) 100 L. T. 280, 281.

(2) (1866) L. R. 1 Ex. 265, 286.

(3) (1868) L. R. 3 H. L. 330.

(4) 100 L. T. 280.

(5) [1942] A. C. 310, 321.

(6) 13 C. B. (N. S.) 430.

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knowledge of its vicious propensities. I should not regard them as tending to show either that there is or is not a general duty to fence. If one comes to the later cases the whole tendency of the decisions is against imposing any liability to fence in ordinary circumstances. *Hadwell v. Righton* (1); *Higgins v. Searle* (2); *Ellis v. Banyard* (3); and *Jones v. Lee* (4) all show this tendency, though in none of them was the exact point decided as negligence was negatived, and in *Ellis v. Banyard* (3), Vaughan Williams and Kennedy L.J.J. were careful to guard themselves against deciding that cattle if allowed to escape in large numbers and obstruct the highway could not constitute a public nuisance. But Bankes L.J. in *Jones v. Lee* (4) and Buckley L.J. in *Ellis v. Banyard* (3) state in terms that there is no liability to fence. The decision in *Higgins v. Searle* (2) seems to me to be to the like effect and the same opinion is expressed in the Scottish case of *Fraser v. Pate* (5), though Lord Anderson leaves for future discussion the case of animals straying on the highway at night. The point, however, was directly decided in *Heath's Garage, Ltd. v. Hodges* (6), and again in *Hughes v. Williams* (7), and the appellant cannot succeed if those cases stand. A different view has it is true been held where animals have been brought on to the road and have not been kept under such reasonable control as is possible whilst they are there. The recent cases of *Turner v. Coates* (8), *Gayler & Pape, Ltd. v. B. Davies & Son, Ltd.* (9), and *Deen v. Davies* (10), are, I think, to be included under this principle.

As Romer L.J. pointed out in the last-mentioned case (11) there is no duty to prevent animals straying on the highway, but if brought on the highway reasonable care must be exercised to control them. Proof of negligence, however, is not always necessary in order to establish liability for damage caused by straying animals. The law seems to have developed on two separate lines. Trespass on the land of another was always actionable at the suit of that other if damage was done to his land and that whether there was negligence or not. Unless he was under a duty to fence that other could therefore sue. On the other hand, there was no duty to prevent beasts *mansuetæ naturæ* from straying on to the highway, unless they

(1) [1907] 2 K. B. 345.	(7) [1943] K. B. 574.
(2) 100 L. T. 280.	(8) [1917] 1 K. B. 670.
(3) 106 L. T. 51.	(9) [1924] 2 K. B. 75.
(4) 106 L.T. 123.	(10) [1935] 2 K. B. 282.
(5) 1923 S. C. 748.	(11) Ibid. 293.
(6) [1916] 2 K. B. 370.	

were known to be vicious. The distinction is natural enough—the landowner's or occupier's property was, it was thought, entitled to be free of invasion, the wrong was the mere entering upon his land and causing damage. On the other hand, much, if not most, of the country was unfenced, as indeed a not unsubstantial portion still is, and passers along the highway had to take it as they found it and run such risks of traffic as are inevitably imposed on those who use it. They too, must take reasonable care to avoid what they find on the road and the obligations of the owners of beasts or of users of the highway are not, in my view, altered by an increase in the fencing of the country or by the increase in the speed of traffic or the imposition of precautions necessary in war-time. The incidence of these changes does not, in my opinion, increase the duties of farmers or the burden on agriculture by increasing the duty to fence. I would dismiss this appeal primarily because no negligence on the part of the respondent has been proved, but also, on the ground that on the facts established, it has not been shown that he was in breach of any duty which he owed to the appellant.

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LORD DU PARCQ. My Lords, the appellant, while riding a bicycle down hill on a country road, at about 1.30 in the morning of April 1, 1944, came into collision with a horse which was straying unattended on the highway. He was injured, and sued the respondent in the county court to recover damages "for negligence and/or nuisance and/or breach of statutory "duty." The action failed, but the learned judge, having regard to the possibility that he might be held to have erred in law, stated his findings of fact and assessed damages. The case went to the Court of Appeal, where the appellant's counsel confessed that the appeal was a "forlorn hope," in view of the authorities binding on that court. It was dismissed, but leave was given to appeal to this House in order that those authorities, which had been criticized with some severity by the Master of the Rolls and two Lords Justices in *Hughes v. Williams* (1), might be considered further by your Lordships. The county court judge found that the horse which caused the appellant's injuries was owned by the respondent, and this finding, read together with the evidence, makes it clear that it was one of two horses which were kept, with some cows or other cattle, in a field adjoining the highway. The judge further found that the

H. L. (E.) horse "got on the road because the fence was defective."
 1946 These were his only findings. The evidence would not, I think,
 SEARLE have supported any further findings in the appellant's favour.
 v. There was no evidence that the peccant horse, which seems to
 WALLBANK. have been at least thirty years old, and to have been accustomed
 Lord du Parc to spend its days drawing a milk-cart, had ever before shown a
 disposition to wander, or any vicious or mischievous propensity.
 There was no evidence that the defects in the fence were of long
 standing, or that the respondent either knew of them or might
 with reasonable care have discovered them.

My Lords, it is a commonplace of our law that there is a striking contrast between the liability of the owner of cattle for their trespass on another's land and his liability for any injuries which they may cause to the person of another. The man whose cattle stray into his neighbour's field, and consume or damage what belongs to that neighbour, is liable to make good the loss although no negligence be proved against him. He is under no such liability for a trespass to the person by an animal which does not belong to an untamed and dangerous species unless it has, to his knowledge, some vicious or mischievous propensity. We are here dealing with ancient doctrines of the common law. At the very beginning of the eighteenth century, in *Mason v. Keeling* (1), the complaint which has been echoed in our own days is to be found in the argument of counsel for the plaintiff: "It is hard," he said, "that one should have a remedy for the least trespass done in his land, and none for a trespass done thus to his person by wounding or maiming." It is doubtful from a comparison of the two available reports of the case whether it resulted in judgment for the defendant or a settlement. However that may be, the forensic protest of the plaintiff's counsel did not deflect the current of authority. The report in Lord Raymond's Reports of *Mason v. Keeling* (2), attributes to Holt C.J. and Turton J. a dictum which I believe to have been then, and to have remained ever since, a correct statement of the law: "If the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise if he had notice that they had done such a thing before." The present case is only distinguishable from that supposed by Holt C.J. in that the horse in the illustration did a vicious act, whereas the horse

(1) (1700) 12 Mod. 332, 333.

(2) (1700) 1 Ld. Raym. 606, 608.

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with which we are concerned may have been only heedless or clumsy. But I take this to be an immaterial distinction. As was said by Romer L.J. (as he then was) in *Deen v. Davies* (1). it would be strange if the owner of a horse which strays on the highway were to be free of liability if his horse kicked a passenger, but liable if the passenger were injured "merely" by the horse trotting along the highway in the natural "manner." My Lords, no such paradoxical conclusion is to be drawn from the authorities. The law was accurately stated by Blackburn J. in *Smith v. Cook* (2), when he said that the owner of animals "not of mischievous nature . . . is entitled" to suppose that they will not injure anyone until he has had "actual knowledge to bring him to a contrary opinion." I would add that if an animal's owner knows that it has shown a tendency to run into cyclists or other passengers on the highway, it cannot avail him to say that it was not vice, but a frolicsome disposition, or perhaps mere blundering, which caused the harm.

Counsel for the appellant submitted that, apart from any question of liability for injury caused by an animal known to its owner to be dangerous, an owner might be liable on the ground of negligence if he could be shown to have failed in his duty to take reasonable care. I agree that, subject to certain reservations, this proposition may be accepted. In the case of *Fardon v. Harcourt-Rivington* (3) in this House, Lord Atkin used words which I would respectfully adopt. "Quite apart," he said, "from the liability imposed upon the owner of animals" or the person having control of them by reason of knowledge "of their propensities, there is the ordinary duty of a person" to take care either that his animal or his chattel is not put to "such a use as is likely to injure his neighbour—the ordinary" duty to take care in the cases put upon negligence." This is not a novel principle. As early as 1676 an action on the case was brought successfully against a defendant who had set about breaking in a horse in Lincoln's Inn Fields, "a place" (as the pleader said) "much frequented by the King's subjects and" unapt for such purposes: " (*Mitchil v. Alestree* (4).) When, in *Cox v. Burbidge* (5), Erle C.J. stated the question before the court to be "whether the owner of a horse is liable for a sudden" act of a fierce and violent nature which is altogether contrary

(1) [1935] 2 K. B. 282, 293.

(4) (1676) 1 Vent. 295.

(2) (1875) 1 Q. B. D. 79, 82.

(5) 13 C. B. (N. S.) 430, 437.

(3) (1932) 146 L. T. 391, 392.

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“to the usual habits of the horse, without more,” the last two words of the sentence were not superfluous. They allow for the possibility that there may be circumstances to account for an animal’s unusual misbehaviour of which the defendant knew and against which it was his duty to guard. Such circumstances were held to exist (to name only two instances) in the recent cases of *Deen v. Davies* (1), and *Aldham v. United Dairies (London), Ltd.* (2). Nevertheless, Lord Atkin’s proposition will be misunderstood if it is not read as subject to two necessary qualifications: first, that where no such special circumstances exist negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and, secondly, that even if a defendant’s omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence.

My Lords, it is manifest that on the judge’s findings of fact negligence cannot be imputed to the respondent, and indeed there was in my opinion no evidence before the court on which a finding of negligence could have been supported. This being so, it is, I think, regrettable that the Court of Appeal was induced to give leave to appeal to your Lordships’ House notwithstanding the objection of the respondent’s counsel that no question of principle could arise on the particular facts of the case. At your Lordships’ bar the learned counsel for the appellant frankly conceded that he could not ask for judgment, but submitted that the case should go back to the county court to be investigated anew on the issue of negligence. Even if your Lordships were of opinion that the appellant had some hope of success in a new trial, it would, I think, be a great injustice to the respondent to order one. The appellant has had his opportunity of putting any available evidence before the court, and cannot ask for a second chance. I would add, however, that there is no reason to suppose that he could do better on another occasion. The only special circumstance to which his counsel could point was that, at the time of the accident, lighting restrictions were in force. But the road was a country road, not normally lighted. It is true that the cyclist’s light was masked or dimmed, but this fact, which was certainly a reason for great care on the part of a cyclist, is not shown to have contributed to

(1) [1935] 2 K. B. 282.

(2) [1940] 1 K. B. 507.

cause the accident. The complaint was, not that the appellant could not see the horse, but that he saw it "dashing out from "the side" of him.

One other argument should perhaps be noticed. Counsel disclaimed any suggestion that the respondent was bound to maintain a fence, and he recognized that for centuries both the law and the general sense of the community have sanctioned the depasturing of cattle on unfenced land. He contended, however, that one who keeps his cattle on land adjoining the highway behind an apparently secure fence must see to it that it is in fact secure, for otherwise (he said) a deceptive feeling of safety will be induced in the passing cyclist or motorist. My Lords, I should have thought that, on principle, where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect. But, however that may be, the argument takes little account of rural conditions. A stray horse, even if it has come from the nearest field and not from one a mile or more away, may have escaped, not through a gap in the fence, but through a gate left open by a trespasser. Moreover, the suggested duty could only be to take reasonable care to maintain a reasonably secure fence, and it must be a very high fence which a horse cannot jump: indeed, we have it on the authority of Byles J. that, in or about the year 1858, it was proved that a bull had leaped over an iron fence six feet high (*Bessant v. Great Western Ry. Co.* (1)). The truth is that, at least on country roads and in market towns, users of the highway, including cyclists and motorists, must be prepared to meet from time to time a stray horse or cow, just as they must expect to encounter a herd of cattle in the care of a drover. An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the farmer's cattle: the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbour to tolerate the untoward results of his neighbour's lawful acts. These observations are, I think, relevant not only to the issue of negligence, but also to the allegation of nuisance. The stray horse on the road does not seriously interfere with the exercise of a common right, and is no more a nuisance in law, merely by reason of its presence there, than the fallen cart-horse or its modern analogue, the lorry which has temporarily broken down. The same considerations which guided the Court

(1) (1860) 8 C. B. (N. S.) 368, 372.

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H. L. (E.) of Appeal in *Maitland v. Raisbeck & R. T. & J. Hewitt, Ltd.* (1), are, I think, applicable here.

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Counsel refrained from contending before your Lordships that the provisions of the Highway Acts could affect the rights of the parties between themselves. Rightly, I think, he accepted as correct the observations of Erle C.J. in *Cox v. Burbidge* (2): "As between the owner of the horse and the owner of the soil of the highway . . . we may assume that the horse was trespassing . . . So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff."

The appellant has suffered what may well have been undeserved misfortune. I am satisfied that no blame for it can, in law, be attributed to the respondent, and I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for C. L. Hale, Nuneaton.*

Solicitors for respondent: *Nash, Field & Co., for Blewitt & Co., Birmingham.*

(1) [1944] K. B. 689.

(2) 13 C. B. (N. S.) 430, 435.

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[HOUSE OF LORDS]

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WICKS APPELLANT;

AND

Dec. 12.

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT.

Criminal law—Offence under Defence Regulations—Committed during currency of Regulations—Expiration of Regulations before conviction—Validity of conviction—Emergency Powers (Defence) Act, 1939, (2 & 3 Geo. 6, c. 62), s. 11, sub-s. 3—Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 2A.

The Emergency Powers (Defence) Act, 1939, s. 11, sub-s. 3

* *Present:* VISCOUNT SIMON, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD DU PARCQ.

provided that "the expiry of the Act shall not affect the operation thereof as respects things previously done or omitted to be done."

The appellant was convicted in May, 1946, of offences committed in 1943 and 1944, contrary to reg. 2A of the Defence (General) Regulations, 1939, made pursuant to the Act. Both the Act and the Regulations expired on February 24, 1946 :—

Held, that, although reg. 2A had expired before his trial, he was properly convicted, since s. 11, sub-s. 3 did not expire with the rest of the Act, being designed to preserve the right to prosecute after the date of expiry.

Decision of the Court of Criminal Appeal (sub nom *R. v. Wicks*) [1946] W. N. 205 ; [1947] L. J. R. 191 affirmed.

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TIONS.

APPEAL from the Court of Criminal Appeal (Lord Goddard C.J., Singleton, Denning, Lynskey and Sellers JJ.).

The appellant, a British subject, was arrested in March, 1946, and was tried at the Central Criminal Court before Croom-Johnson J. in May, 1946, on an indictment containing several counts charging him with doing acts (such as entering the service of an enemy broadcasting station and preparing propaganda for enemy broadcasts) at various dates between April, 1943, and January, 1944. In each case the statement of offence alleged that the act done was "likely to assist the enemy, contrary to reg. 2A of the Defence (General) Regulations and s. 3, sub-s. 1 (b) of the Emergency Powers (Defence) Act, 1939." and the particulars of offence stated that it was done "with intent to assist the enemy." (The Act and the Regulations expired on February 24, 1946). On May 27, 1946, the jury found the appellant guilty and he was sentenced to four years' penal servitude. The Court of Criminal Appeal affirmed the conviction on November 4, 1946, and he appealed to the House of Lords, the Solicitor-General having certified that the matter involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought.

Melford Stevenson K.C. and *Sir John Cameron* for the appellant. This is a pure question of the interpretation of s. 11, sub-s. 3, of the Act, on which the appellant relies. His acts were not "things previously done" within the meaning of the sub-section which does not cover offences previously committed. It was really designed to declare that executive and ministerial acts were protected after the expiry of the Act, although, but for the Act, they would have been breaches

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of the ordinary law. It is in the nature of an indemnity clause. The language of the sub-section is elliptical and capable of more than one interpretation, so that it should be construed in favour of the appellant: *R. v. Chapman* (1). Other Acts dealing with a similar situation have used different words, more precise language. A particular and well-known formula has been adopted to express the consequences of expiry but since in this Act quite different language is found, it is reasonable to give it a different interpretation: see Interpretation Act, 1889, s. 38; Emergency Laws (Transitional Provisions) Act, 1946, s. 1, sub-s. 3; sch. I., part III., para. 6; Defence (Administration of Justice) Regulations, 1940, reg. 16. The Interpretation Act, s. 38, applies only in the case of a statute or a regulation having the force of statute when it is repealed and not when it expires by effluxion of time. In the Act of 1939, s. 11, sub-s. 3, was inspired by the same sort of apprehension as that referred to by Lord Herschell in *West Derby Union v. Metropolitan Life Assurance Society* (2). [They also referred to *Bennett v. Tatton* (3) and *Steavenson v. Oliver* (4).]

Sir John Cameron following. The provisions of s. 11 must be read as a whole. The general rule is stated in sub-s. 1, which declares that the Act "shall then expire." There are two exceptions to this (a) in the proviso to sub-s. 1, where the Act may be brought to an end later and (b) sub-s. 2, whereby the Act may be brought to an end earlier. There are no other exceptions, and sub-s. 3 is not an exception to the general rule as to expiry. It qualifies but does not prolong the operation of the Act, which is dead. The Crown contends that the words "shall not affect the operation" mean "shall not terminate the operation." They only mean that the "expiry shall leave unaffected past operations" of the Act. Parliament, in passing this Act, must be taken to have had knowledge of the observations of Avory J. in *Bennett v. Tatton* (3). Admittedly, on the appellant's interpretation a man who broke the regulation very shortly before it expired could not be punished because there would not be time to convict him. That was in accordance with the old common law principle and nothing in this Act affects it. The Act was in fact continued in force beyond the year provided for in

(1) [1931] 2 K. B. 606.

(3) (1918) 88 L. J. (K. B.) 313.

(2) [1897] A. C. 647, 653.

(4) (1841) 8 M. & W. 234.

s. 11, sub-s. 1, for, when it was passed, Parliament did not know how long the war would last.

Sir Frank Soskice S.-G., Gerald Howard and Bass for the Crown were not called on to argue.

VISCOUNT SIMON. My Lords, the Solicitor-General, in the exercise of the discretion which is vested in him under the Law Officers Act of 1944, when the Attorney-General is not available, has certified that the decision of the Court of Criminal Appeal, dated November 4, 1946, in this matter involves a point of law of exceptional public importance and that, in his opinion, it is desirable in the public interest that a further appeal should be brought. Accordingly, the House is called upon to deal with the appeal.

Having heard the arguments for the appellant, I have formed the clear conclusion that the decision of the Court of Criminal Appeal is right and that the appeal should be dismissed. The point involved can be stated in very few words. The appellant, who is a British subject, was convicted at the Central Criminal Court before Croom-Johnson J. on an indictment containing a number of counts charging him with doing acts (such as entering the service of an enemy broadcasting station, and preparing propaganda for enemy broadcasts) at various dates between April, 1943, and January, 1944—acts which were “likely to assist the enemy,” and were done “with intent to assist the enemy,” contrary to reg. 2A of the Defence (General) Regulations as applied to British subjects abroad by s. 3, sub-s. 1 (b), of the Emergency Powers (Defence) Act, 1939. There is, of course, no doubt that when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, i.e., which is intra vires of the regulation-making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal in its judgment has pointed out (1), that was decided by the Divisional Court in the case of *Willingale v. Norris* (2), and it appears to me that that decision is perfectly correct. Consequently, the charge against the appellant here was, in effect that he had committed crimes defined or contained in the Act of Parliament. Now, at the date when these acts were committed, the regulation to which I have referred was in

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(1) [1947] L. J. R., 191, 192.

(2) [1909] 1 K. B. 57.

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force, and if the appellant had been prosecuted immediately afterwards—he may not have been in England at that time, but if he had been prosecuted immediately afterwards—then the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on February 24, 1946. The trial of the accused, however, only took place in May, 1946, and he was convicted and sentenced to four years' penal servitude on May 28.

The question raised by this appeal, therefore, is simply this: Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation has expired? As was pointed out in the course of the argument, to which we have closely listened, very strange results would follow if that were so. Supposing the case were one in which a man broke the regulation a week or two before it expired, then on the argument of the appellant, as those appearing for him have quite frankly admitted, he could never be punished, unless, indeed, the trial was carried to the point of conviction before the regulation itself expired. One could put a more extreme case: the authorities may have been so prompt as to start the prosecution before the regulation had expired, but if the trial were not over, then at the very moment when the regulation expired the trial would necessarily cease and the man would go free. In so far as one is entitled to consider the reasonableness of the contentions put forward by the appellant, obviously those results would be far from reasonable. But of course the question is not, or at any rate not mainly, whether such a result would be reasonable or such as one should expect; the question is a pure question of the interpretation of sub-s. 3 of s. 11 of the Emergency Powers (Defence) Act, 1939. I need not read it, because we have gone through it, with the help of counsel, very carefully.

It is pointed out that s. 38 of the Interpretation Act, 1889, does not apply to the case of a statute, or a regulation which has the power of a statute, when it expires by effluxion of time. The section in the Interpretation Act is addressed to Acts which have been repealed, and not to Acts which expire owing to their purely temporary validity. It is, I apprehend, with this distinction in mind, which is quite well-known, and certainly quite well-known to the authorities who frame statutes, that the draftsman inserted the words used in s. 11. Section 11

begins with the words "Subject to the provisions of this "section," and those introductory words are enough to warn anybody that the provision which is following immediately is not absolute, but is going to be qualified in some way by what follows. It is therefore not the case that, at the date chosen, the Act expires in every sense; there is a qualification. Without discussing whether the intermediate words are qualifications, sub-s. 3, in my opinion, is quite plainly a qualification. It begins with the phrase "The expiry of this "Act"—a noun which corresponds with the verb "expire" —"The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to "be done."

Learned counsel for the appellant have therefore been driven to argue ingeniously, but to admit candidly, that the contention which they are putting forward is, that the phrase "things "previously done" does not cover offences previously committed. I think that view cannot be correct. It is clear that Parliament did not intend sub-s. 3 to expire with the rest of the Act, and that its presence in the statute is a provision which preserves the right to prosecute after the date of expiry. This destroys the validity of the appellant's argument altogether.

The Court of Criminal Appeal, after a most careful examination of the whole matter, came to this conclusion—and I am now quoting the words of Lord Goddard C.J. (1): "In our "opinion, giving the words of the sub-section their natural "meaning, there is neither doubt nor ambiguity and the result "would appear to be both just and reasonable." I think your Lordships unanimously agree with the conclusion of the Court of Criminal Appeal, and I therefore move that this appeal be dismissed.

LORD THANKERTON. My Lords, I concur in the speech which has just been delivered by my noble and learned friend on the woolsack. I would like to add that the intention of Parliament is not to be judged of by what is in its mind, but by its expression of that mind in the statute itself. The question here arises on the construction of sub-s. 3 of s. 11 of the Act of 1939. As regards the proper construction of that statutory provision I have found no difficulty; and I will only add that I agree with the words of the Lord Chief Justice (1): " . . . giving the words of the sub-section their natural "meaning, there is neither doubt nor ambiguity."

(1) [1947] L. J. R. 191, 196.

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H. L. (E.) LORD MACMILLAN. My Lords, I also agree.

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LORD WRIGHT. My Lords, I also agree, and having nothing to add.

LORD PORTER. My Lords, I concur.

LORD SIMONDS. My Lords, I also concur.

LORD DU PARCQ. My Lords, I concur.

Appeal dismissed.

Solicitors for appellant : *Ludlow & Co.*

Solicitor for the Crown : *Director of Public Prosecutions.*

Miller v. Glasgow Corporation [1947] A. C.

368.

Distinguished. GLASGOW COR-

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[1948] A. C. 79

Distinguished. LANCASTER v. L.P.
T.B. [1948] 2 All E.R. 796.

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[HOUSE OF LORDS]

1946
Nov. 15;
Dec. 16.

GRAHAM OR MILLER . . . APPELLANT ;

AND

GLASGOW CORPORATION . . . RESPONDENT.

Master and servant—Common employment—Local authority operating tramway service—Collision between two tramcars—Driver of one tramcar negligent—Injury to conductress of other tramcar.

Two tramcars owned and operated by a local authority, being engaged in the same service and following the same route on the same line of rails, collided on the public highway through the negligence of the driver of one of them, whereby the conductress of the other was injured :—

Held, that the driver and the conductress were carrying out a "common work" in the employment of the local authority which was accordingly relieved, by the doctrine of common employment, from liability in respect of her injury.

The expression "common work" covers the case where the work of one servant is so related to that of the other that the risk of injury to the one through the carelessness of the other is not merely fortuitous, but is involved in the relationship itself, so that such risk must be deemed to have been in the contemplation of the injured servant when he entered into his contract of service.

**Present* : VISCOUNT SIMON, LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS and LORD DU PARCQ.

Radcliffe v. Ribble Motor Services, Ltd. [1939] A. C. 215 H. L. (Sc.) distinguished.

Decision of the Second Division of the Court of Session 1946 S. C. 109 affirmed.

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APPEAL from the Second Division of the Court of Session.

The facts, stated by Viscount Simon, were as follows: On January 22, 1944, the appellant sustained personal injuries when engaged in her employment by the respondent corporation as a conductress of an electric tramcar, No. 1011. The tramcar was in Kilbowie Road, Clydebank, about to travel up a steep incline, and at a short distance in front of it, on the slope of the hill, was another tramcar of the respondent corporation, No. 1089, moving in the same direction. The two cars were on the same line of rails and were part of a sequence providing the same shuttle-service, each with its appropriate time-table. The electric system of car No. 1089 became overloaded while mounting the hill; a contact-breaker, with which each car was fitted as a safety device, came into operation; and, as a result, the car was left on the slope without electric motive power. The duty of the driver in such circumstances was promptly to apply his brakes and thus hold the car stationary. He negligently failed to do so and car No. 1089 ran backwards down the hill until it collided with car No. 1011. In the collision the appellant was injured. The respondents admitted that the negligence of the driver of car No. 1089 caused the injury.

The appellant having brought an action against the respondents for damages, the respondents pleaded that, her injuries being due to the negligence of a fellow employee, her claim was excluded by the doctrine of common employment. The Lord Ordinary (Lord Patrick) repelled this plea and awarded damages. The Second Division of the Court of Session sustained the plea. The appellant appealed to the House of Lords.

Walker K.C. and *Connolly* (both of the Scottish Bar) for the appellant. No inference of common employment or common work can be drawn, as between the appellant and the negligent driver. There was no common object between their employment. The object of the appellant's employment, from her point of view, was to work her own tram in conjunction with her own driver. The operation of the tramway system or the particular route was an object of the respondents' undertaking

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rather than the appellant's employment. There is no material from which it can be reasonably inferred that she had more reason to be interested in the skill of the negligent tram driver than in that of the driver of any other vehicle. The railway cases are different from the road cases, where the vehicles are in the public street and it is necessary to disentangle the relations of the persons concerned as employees from their relations as road users. The service of tram drivers does not bring them together but disperses them at intervals. It is only accidentally that they come together and then only in traffic blocks, like other vehicles. Their proximity is not a reasonable incident of the service. The fact that the appellant's tram could not escape from the other one running downhill is not significant. The risk was just the same in relation to all other vehicles. The test laid down in *The Petrel* (1) necessarily imports that in cases of common employment the risk is greater from fellow servants than from others. If trams were more often in collision with other trams than with other vehicles that requirement would be fulfilled but this is not the fact. The position would be different in the case of a convoy where the special relationship between the vehicles would create a risk greater in degree. The appellant relies on *Radcliffe v. Ribble Motor Services, Ltd.* (2); *Metcalf v. London Passenger Transport Board* (3); *Kerr v. Glasgow Corporation* (4); and *Neilson v. Pantrini* (5).

Morison K.C. (of the English Bar, K.C. of the Scottish Bar), *Calver K.C.* and *Cunningham* (both of the Scottish Bar) for the respondents. On the facts the appellant and the negligent driver were fellow servants under the same employer operating a system in common work and exposed to risks to which ordinary road users were not exposed, their work being the provision of a regular passenger service to the public on fixed rails on the same route. The real question is: Was it an implied term in the appellant's contract of employment that she should undertake to be exposed to the risk of negligence on the part of fellow servants operating the tramway system? In the course of her employment she was specially interested in the skill and competence of the driver of the leading tramcar and negligence on his part in carrying out his duties at such was a risk necessarily incidental to her employment as con-

(1) [1893] P. 320, 324.

(3) (1939) 108 L. J. (K. B.) 733.

(2) [1939] A. C. 215, 222, 223,
228, 230, 236, 250, 251.

(4) 1945 S. C. 335, 345, 351.

(5) 1946 S. C. 446.

ductress of the following tramcar. The conditions of her employment thus naturally brought her into such local and causal relationship with her fellow-servant, the driver of the leading tram that the risk of negligence on the part of the one was an ordinary risk of the service of the other, naturally incidental to that service and not merely accidental or coincidental. The two trams on the same set of rails were necessarily in juxtaposition for some considerable time and if, for any reason, the leading tram ran backwards it must run into the rear tram. This is a necessary risk when there is an organized service of tramcars following each other along fixed rails and often losing their regular intervals. Thus the crews of the tramcars are particularly exposed to danger from each other. The accident which occurred was specifically a tramcar accident and could only have happened to tramcars. Before *Radcliffe v. Ribble Motor Services, Ltd.* (1), it was never doubted that the servants of a local authority operating transport services were fellow-servants for the purposes of the doctrine of common employment, but the ground of that case was that the vehicles were engaged on totally different and independent journeys: see *Radcliffe's* case (2). That was not the case here. The appellant's argument would involve splitting up this tramway system into innumerable separate units. *Metcalfe v. London Passenger Transport Board* (3) was a decision on the same lines as *Radcliffe's* case (2). It is not disputed that it was right on its own particular facts.

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THE HOUSE took time for consideration.

Dec. 16. VISCOUNT SIMON. My Lords, apart from the possible application of the doctrine of "common employment," the liability of the defendants, in accordance with the axiom *respondeat superior*, is undisputed. The sole question in the case is whether, in view of the fact that the injured conductress and the negligent driver were both employed by the respondents and were respectively at work as above described, the doctrine operates to relieve the corporation from liability. I am of opinion that it does, and I should be prepared to adopt as it stands the judgment of the Lord Justice-Clerk delivered on behalf of the judges of the Second Division of the Court of Session. But in view of the fact that we have before us a

(1) [1939] A. C. 215.

(3) 108 L. J. (K. B.) 733.

(2) *Ibid.* 216, 223, 236, 252,

253, 254.

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careful opinion of the Lord Ordinary (Lord Patrick) sustaining the opposite view, and of the excellent arguments from each side addressed to this House, I will state the grounds of my conclusion in my own words.

The first judicial indication of the defence of "common employment" is to be found in the judgment of Lord Abinger C.B. in 1837 in *Priestley v. Fowler* (1). The defence depends on the theory that the contract of employment between workman and employer contains an implied term that the workman will not hold his employer liable for an injury due to the negligence of a fellow-servant engaged in common employment with him. In 1858 the House of Lords, through the mouth of Lord Cranworth L.C. laid it down that the same doctrine applied in the law of Scotland—*Bartonshill Coal Co. v. Reid* (2) and *Bartonshill Coal Co. v. McGuire* (3). The Employers' Liability Act, 1880, provided a statutory exception to the common law rule, and the Workmen's Compensation Acts, under which the employer's liability does not depend on negligence at all, give no room for the defence in cases dealt with under those Acts. But, apart from statute, the common law rule, within proper limits, still applies. At one time it might almost have seemed that the defence of common employment could be compendiously expressed by saying that at common law a servant cannot claim damages from his master for the negligence of a fellow servant. In view, however, of the increasing ramifications of business and of the many cases in which one servant could not be supposed to have had in contemplation of the negligence of another servant engaged on quite a different piece of work and acting in quite a different sphere, later judicial pronouncements have made it clear that the defence provided by the doctrine is not available without regard to the circumstances, and have made room for the conception that two servants are not necessarily in "common employment" because they have a common employer. Regard must be had to the work they are respectively doing and to the relation between them when they are working. But the defence still depends upon the conception, however artificial, of an implied contract. The issue is whether, having regard to the particular facts, the implied contract must be considered to cover the case. Fine distinctions may be involved but, where necessary, they must

(1) (1837) 3 M. & W. 1.

(3) Ibid. 300.

(2) (1858) 3 Macq. 266.

be made, and it is dangerous to argue that a decision on one set of facts would provide a sufficient guide if the facts were somewhat varied.

The qualification to be introduced in mitigation of the bald proposition that a servant cannot hold his employer liable at common law for the negligence of a fellow-servant was closely examined and carefully defined by this House in *Radcliffe v. Ribble Motor Services, Ltd.* (1). It is a striking proof of the fineness of the distinction to be drawn that both the Lord Ordinary and the Court of Session founded their conclusions in the present case on what was said in *Radcliffe's* case (1), but with contradictory results—Lord Patrick holding that the defence of common employment therefore failed to exonerate the respondents, and Lord Cooper that it therefore succeeded. In *Radcliffe's* case (1) the facts were that two motor-coach drivers in the service of the same employer, after helping to take a party of people to New Brighton, were free to bring the empty vehicles back to the garage at Bootle by any route each driver chose. The coach driven by Radcliffe stopped in a street in Liverpool: Radcliffe got out and was standing on its offside when the other coach, proceeding independently, but as it happened, along the same street, owing to the negligence of its driver passed too close and crushed Radcliffe. The two drivers were held not to be, at the time of the accident, in common employment. The one driver “was no more “interested in the skill of the other than in that of the drivers “of the myriads of other vehicles in whose vicinity he might “happen to drive” (per Lord Atkin (2)). “The risk was the general risk of the highway, not the specific risk of the fellow-servant’s negligence” (per Lord Wright (3)). Jeune P. in *The Petrel* (4) had already drawn the same kind of distinction in the case of a collision at sea of two ships belonging to the same owner. He said: “The consideration that the risk of injury “to the one servant is the natural and necessary consequence “of misconduct in the other implies that the skill and care “of the one is of special importance to the other by reason “of the relations between their services. Tried by this “principle, can it be said that the safety of the captain of “one ship of a company is in the ordinary and natural “course of things dependent on the skill and care of the “captain of another ship of the same company, or that injury

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(1) [1939] A. C. 215.

(2) Ibid. 232.

(3) Ibid. 254.

(4) [1893] P. 320, 326.

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“ by the negligence of one is an ordinary risk of the service
 “ of the other? In some cases it might perhaps; for example,
 “ it might if all the ships of the company were in the habit of
 “ meeting in the same dock, and the safety of each thus
 “ became in the ordinary course of things, dependent on the
 “ skill with which the other was navigated. But in regard to
 “ navigation on the high seas, or in the estuary of the Thames,
 “ would a captain of one ship of the General Steam Navigation
 “ Company have more reason to be interested in the skill
 “ of a captain of another ship of the company than in that
 “ of the masters of the myriad other craft in whose vicinity
 “ he might happen to navigate? By no reasonable supposition
 “ can it be imagined that he would. I think, therefore, that
 “ these two captains were not in common employment.”

The criterion is often expressed by saying that, to make good the defence of common employment, it is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured, but it is also necessary that the two should have been engaged at the time of the injury in a “ common work.” But this last expression also needs definition, or at any rate explanation. “ Common work ” is not limited to the sharing of the same task, like the task of two sawyers in a saw-pit, or of engine-driver and stoker on the footplate of a locomotive: the phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one due to the carelessness of the other is not merely fortuitous, but is a special risk involved in the relationship itself, so that such risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service. *Radcliffe's* case (1), therefore, does not support the broad proposition that the defence of common employment is never available when two vehicles driven by fellow-servants of the same employer collide in the high road. If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, i.e., the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow-servant. The risk he runs is a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity. But if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they

(1) [1939] A. C. 215.

are engaged in a "common work" and the term in the contract of employment exonerating the common employer from liability has to be implied.

Here we have a collision between two of the corporation's tramcars engaged in the same service and following the same route on the same pair of rails. They are intended, of course, to maintain a proper interval between them, as their timetables prescribe. But it is notorious that in the course of practical working tramcars moving in the same direction on a line of rails sometimes cluster and unless carefully handled may run into one another. There is no "block system" as there is on railways, by which signals warn a following train not to advance along a section of the line until it is clear of the preceding train. Moreover (and this is the most significant circumstance) if there is danger of collision between two tramcars on the same line of rails, either by the foremost running backward or by the car following advancing too fast neither car can avoid the collision by lateral movement, for each can move only along the fixed grooves. Every case in this branch of the law depends on its own facts, and obviously a collision between tram and tram is not governed by all the same considerations as a collision between bus and bus, or even between bus and tram each following its own route and happening to collide in the roadway. An instance of the latter occurred in *Metcalf v. London Passenger Transport Board* (1), where Lord Greene M.R. pointed out, that the risk did not arise out of any special relation between the injured and the negligent fellow-servants but was a type of risk in a public thoroughfare which was equally present when the negligently driven vehicle belonged to and was driven by the servant of a different owner.

I cannot agree with Lord Patrick (2) that "on the facts of this case the defenders have failed to prove that the pursuer was subject in any greater degree to the risk of her tramway car being in collision with tramway car 1089 than she was to the risk of its being in collision with one of the countless vehicles in whose vicinity it would be while traversing the streets of Glasgow." On the contrary, the circumstance that tramcars cannot avoid an impending collision by lateral movement and that a common path is prescribed for them by the rails on which they both travel necessarily creates a greater

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(1) 108 L. J. (K. B.) 733.

(2) 1946 S. C. 109, 112.

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risk, and there was uncontradicted evidence of this "unavoidable feature of the operation of a tramway system." The crews of the two tramcars were carrying out a "common work." On the facts of this case, therefore, the appellant's contract of employment was rightly regarded by the Court of Session as including the implied term exonerating the respondents from liability for the negligence of her fellow-servant. I move that the appeal be dismissed.

LORD THANKERTON. My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the woolsack.

LORD MACMILLAN (read by LORD THANKERTON). My Lords, the respondents plead that the appellant's injuries being due to the negligence of a fellow employee, her claim is excluded by the doctrine of common employment. Since the decision of this House in the case of *Radcliffe v. Ribble Motor Services Ltd.* (1), some attempt has been made to suggest that the plea of common employment is inapplicable to the case of traffic accidents occurring on the highway, though due to the negligence of a fellow servant, on the ground that such accidents are incidental to the general use of the highway by the public and are not among the special risks of a fellow servant's negligence which an employee is impliedly taken to have assumed on entering his employment. The case of *Radcliffe* (1) affords no warrant for any such limitation of the doctrine. Two fellow servants may be engaged in a common employment on the highway just as they may be so engaged elsewhere. The place where the negligent act occurred is no more than one of the elements to be considered in deciding whether the servants involved were at the time in common employment in the relevant sense. The test is one of relationship, not of locality. The question must always be whether the nature of the employment in which the fellow servants were engaged is such as to bring them at the time and place of the accident into association with each other in carrying on some activity in common. Each case must be judged on its own facts. In the present case the Lord Ordinary on his view of the facts has held that the plea of common employment is inadmissible, while the Second Division of the Inner House on their view of the facts have sustained the plea. In my opinion the evidence amply justifies the summary of the facts

with which the Lord Justice-Clerk concludes his opinion and on which he and his colleagues base their decision. I agree both with his summary of the facts and with his conclusion in law. I accordingly concur with the motion that the appeal be dismissed.

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LORD SIMONDS. My Lords, I concur in the opinion delivered by my noble and learned friend on the woolsack.

LORD DU PARCQ. My Lords, I also concur in the opinions which have been delivered.

Appeal dismissed.

Solicitors for appellant : *H. S. L. Polak & Co., for Edward J. Boyle, Glasgow, and Edmund M. M'Cabe, Leith.*

Solicitors for respondents : *Martin & Co., for Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS]

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DOUDIE APPELLANT ;

AND

KINNEIL CANNEL & COKING COAL

COMPANY LIMITED RESPONDENTS.

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Nov. 14 :
Dec. 16.

Workmen's compensation -- Compensation -- Assessment -- Partial incapacity -- Subsequent accident producing total incapacity -- Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 1 (c).

By s. 9, sub-s. 1 of the Workmen's Compensation Act, 1925 :
" The compensation under this Act where total or partial incapacity
" for work results from the injury shall be a weekly payment
" during the incapacity of an amount calculated in accordance
" with the rules hereinafter contained : Provided that
" (c) the weekly payment shall in no case exceed thirty shillings."

A workman receiving 15s. a week compensation in respect of partial incapacity resulting from an accident and thereafter engaged by his employers to do light work subsequently suffered, in their service, a second accident whereby he was totally incapacitated.

Held, that he was entitled to 30s. a week compensation in

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addition to the 15s. a week which he was already receiving, since the right to compensation conferred by the Act arose at once on the happening of the accident and must be assessed on its own merits, any other previous or subsequent accident being irrelevant; the proviso meant that the maximum applied to limit the compensation for injury resulting from any one accident, so that multiple accidents might in some instances result in providing the workman with compensation in a total sum exceeding 30s. a week.

Thompson v. London & North Eastern Ry. Co. [1935] 2 K. B. 90 approved and followed.

M'Kinstrey v. Auchinlea Coal Co. 1920 S. C. 75 overruled.

Decision of the Second Division of the Court of Session reversed.

APPEAL from the Second Division of the Court of Session.

In an arbitration under the Workmen's Compensation Acts, the arbitrator, in his stated case, set out the facts thus :
 " (1.) The [appellant] is married and his wife is alive and there
 " is one child of his marriage, a daughter, who is alive and is
 " under fifteen years of age. (2.) On February 15, 1939, the
 " [appellant] while in the employment of the respondents had
 " been injured by accident arising out of and in the course of
 " his work. (3.) He was thereby incapacitated for work and
 " the respondents paid him compensation as for total incapacity.
 " (4.) On or about February 26, 1943, the [appellant] was
 " able to resume light work. (5.) The respondents then
 " agreed to pay and did pay the [appellant] compensation in
 " respect of partial incapacity at the rate of 15s. per week
 " with supplementary allowances. (6.) On April 17, 1944, the
 " [appellant] sustained injury to the thumb of his left hand by
 " accident arising out of and in the course of his work with
 " the respondents and was thereby incapacitated for work
 " until June 7, 1944. (7.) The [appellant] has claimed in
 " respect of the accident on April 17, 1944, compensation at
 " the rate of 30s. per week with supplementary allowances
 " from April 18, 1944, to June 6, 1944, inclusive. (8.) The
 " respondents have tendered to the [appellant] the sum of
 " 15s. per week in addition to the sum of 15s. already paid
 " in respect of the accident which occurred on February 15,
 " 1939, together with supplementary allowances." On these
 facts the arbitrator found in law that the appellant was not
 entitled to receive from the respondents the sum of 15s. a week
 with supplementary allowances in respect of the first accident
 from April 18, 1944, to June 6, 1944, inclusive, but was entitled
 to receive in respect of the second accident the sum of 30s.

a week with supplementary allowances during this period. This decision was affirmed by the Second Division of the Court of Session. The appellant appealed to the House of Lords.

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Walker K.C. and *Connolly* (both of the Scottish Bar) for the appellant. The appellant contests the arbitrator's first finding in law but not his second. On the true construction of s. 1, sub-s. 1, and s. 9, sub-s. 1 (c) of the Act he is entitled (a.) to 15s. a week in respect of his partial incapacity resulting from his first injury by accident and (b.) 30s. a week in respect of his total incapacity following on his second injury by accident, both with supplementary allowances. *M'Kinstrey v. Auchinlea Coal Co.* (1) was wrong in law and should be overruled. *Thompson v. London & North Eastern Ry. Co.* (2) should be followed. The words "incapacity for work" in s. 9, sub-s. 1, refer to gainful work. "Total incapacity" means that the capacity for earning has been extinguished. That capacity may be extinguished by an accident even though it has been previously diminished. Incapacity is not one and indivisible, for compensation under the Act is given only for incapacity resulting from an employment injury. Thus it may be necessary to treat incapacity as being divisible to see what part of it is due to the relevant cause. When a man has been partially incapacitated by an employment injury and later becomes totally incapacitated by a non-employment injury, his right to compensation for partial incapacity continues: *M'Cann v. Scottish Co-operative Laundry Association, Ltd.* (3). Each accident and its resulting incapacity must be kept quite separate. It is agreed that the appellant was entitled to the supplementary allowances under the Workmen's Compensation (Supplementary Allowances) Act, 1940, and that, on the basis of two concurrent weekly payments, he was entitled to supplementary allowances in respect of each: see s. 1, sub-s. 4, of that Act. While the aggregate of these allowances was limited by the maximum figures specified in s. 1, sub-s. 1 (a) and (b), the Act contains no further limitation arising out of the fact that the weekly payments are two concurrent ones. Each weekly payment and its relative allowances appears to be separately subject to the limitation of seven-eighths of the average earnings at the date of the

(1) 1920 S. C. 75.

(3) 1936 S. C. (H. L.) 12.

(2) [1935] 2 K. B. 90.

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first and of the second accident respectively : see s. 1, sub-s. 2. One result of the judgment of the court below was to exclude all reference to seven-eighths of the higher earnings at the date of the first accident and, by finding the appellant entitled only to a single weekly payment in respect of the second accident, to impose a total limit by reference to seven-eighths of the lower average earnings at the date of the second accident. This is not warranted by the Acts.

Morison K.C. (of the English Bar, K.C. of the Scottish Bar) and *David Watson* (of the English Bar) for the respondents. The question is not as to the right to compensation but as to the amount under s. 9 of the 1925 Act. Compensation is payable in cases of total or partial incapacity for wage earning throughout the duration of that incapacity and a workman may properly receive under the Act payments of compensation in respect of successive partial incapacities : see *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1). But in this case the second accident did not truly cause the total incapacity, since part of it was caused by the first accident. "Incapacity for work," within s. 9, sub-s. 1 of the Act can never be more than total incapacity for work, however many injuries by accident the workman may have suffered : *M'Kinstrey v. Auchinlea Coal Co.* (2), which was rightly decided and governs this case. Though a workman may have two concurrent rights to compensation, these are governed by the provisions of s. 9 of the Act. The meaning of s. 9, sub-s. 1 (c) is not that the weekly payment in respect of the injury shall not exceed 30s., but that it shall in the case of no man exceed 30s. That is the maximum weekly payment in respect of partial or total incapacity for work. *Thompson v. London & North Eastern Ry. Co.* (3), was wrongly decided. *Harwood v. Wyken Colliery Co.* (4) and *Hodgson v. West Stanley Colliery* (5), which were cited in it have nothing to do with the present question. If a workman, who has been receiving a weekly payment in respect of partial incapacity, is totally incapacitated by a second accident and receives the statutory maximum payment for total incapacity, the weekly payment in respect of partial incapacity should be merely suspended and not terminated and if incapacity from the second accident were to cease and partial incapacity from the first accident still persisted, then

(1) [1944] A. C. 14, 23.

(4) [1913] 2 K. B. 158.

(2) 1920 S. C. 75, 79.

(5) [1910] A. C. 229, 231.

(3) [1935] 2 K. B. 90.

the right to receive a weekly payment in respect of partial incapacity would revive : see *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (1). [They also relied on s. 9, sub-s. 1 (b) as interpreted in *Evans v. Oakdale Navigation Collieries, Ltd.* (2).]

Walker K.C. replied.

THE HOUSE took time for consideration.

Dec. 16. VISCOUNT SIMON. My Lords, this is an appeal from the Second Division of the Court of Session raising a question of construction under the Workmen's Compensation Act, 1925. The Court of Session followed a previous decision of that court in the case of *M'Kinstrey v. Auchinlea Coal Co.* (3), and on this ground decided against the contention of the workman, who is the present appellant. A decision of the Court of Appeal in England in *Thompson v. London and North Eastern Ry. Co.* (4) (Lord Hanworth M.R., Slesser and Romer L.JJ.), is to the contrary effect, and there is no doubt that the respective conclusions in *M'Kinstrey's* case (3) and *Thompson's* case (4) conflict with one another. The question before the House, therefore, is, which of these decisions correctly interprets the provisions of the Act on the point involved. The situation to be dealt with occurs where a workman meets with two accidents in succession, each of which arises out of and in the course of his employment and inflicts personal injury on him. The injury caused by the first accident gives rise to a weekly payment during partial incapacity, and while these circumstances continue to exist a second accident befalls him causing injury involving total incapacity, in respect of which the workman has a claim for compensation. In *M'Kinstrey's* case (3), Lord Dundas, delivering the opinion of the Scottish court, adopted the view that incapacity "can never be more than total incapacity, however many injuries by accident the man may have suffered from" and hence concluded that the maximum weekly payment which a workman could receive under the Act, however many accidents he might have met with, was the maximum fixed by the statute where there had been only one accident producing total incapacity. In *Thompson's* case (4), on the other hand, it was held that a workman, who is in receipt of compensation under the Act

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(1) [1937] 2 K. B. 426, 428.

(2) [1940] 1 K. B. 702, 710.

(3) 1920 C. S. 75, 79.

(4) [1935] 2 K. B. 90.

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for partial incapacity resulting from the first accident, should continue to receive this compensation in addition to further weekly compensation in respect of the total incapacity resulting from a second accident. The result would therefore be, according to the Court of Appeal in England, that a workman who met with more accidents than one and had a claim for compensation in respect of each might be in receipt of a larger sum than the maximum prescribed if only one accident had occurred.

The whole matter turns on the proper application of proviso (c) to s. 9, sub-s. 1 of the Act. This proviso runs:—
“The weekly payment shall in no case exceed thirty shillings.”
Does “in no case” mean “in the case of no individual” or “in the case of no given accident”? More at length, does the proviso mean that a workman who has been injured more than once and has been entitled to compensation in respect of more than one accident cannot receive total compensation exceeding 30s. a week? Or does it mean that this maximum applies to limit the compensation for injury resulting from any one accident, so that multiple accidents may in some instances result in providing him with compensation in a total sum exceeding 30s. a week? It seems to me that, on examining the language of the Act, the preferable construction is the latter of these alternatives. When s. 9 begins by saying that: “The compensation under this Act where total or “partial incapacity for work results from the injury shall “be a weekly payment during the incapacity of an amount “calculated in accordance with the rules hereinafter contained,” the “injury” is the specific injury then under consideration which produces a degree of incapacity. The proviso is a proviso to this section and relates to compensation for the specific injury. The fact that a workman has been previously injured and partly incapacitated is irrelevant. This view of the meaning of the phrase “the injury” is supported by considering the language of s. 1 of the Act where a particular “personal injury by accident” is plainly dealt with. The proviso does not say, or mean, that however many accidents the workman has to endure the compensation in respect of all of them put together can never be more than 30s. a week.

This view of the matter is greatly strengthened by two further considerations. It is not disputed that, for the purpose of testing the true construction of s. 9 the case must

be considered of a workman who meets with his first accident when in the employment of A but meets with his second accident when in the employment of B. In such circumstances it appears impossible to construe the Act otherwise than as above suggested. There is nothing whatever in the Act providing for an adjustment between the two employers, yet if the first accident produces partial incapacity with considerable but partial loss of earning power so that A becomes liable to make a weekly payment of, say, 15s., the workman, when he enters the employment of B, may receive substantially lower wages than he would have if he were a completely fit man, and yet the measure of compensation for a second accident producing total incapacity will partly turn on the wages he was receiving from B before this occurred. It would be a remarkable result if, in these circumstances, the man's total incapacity produced while serving B should have the result of suspending or wiping out altogether A's previous liability to make the weekly payment previously due from him. Moreover, it has been decided by this House in *M'Cann v. Scottish Co-operative Laundry Association, Ltd.* (1), that a liability to pay compensation under the Act for partial incapacity does not cease because at a later date the workman becomes totally incapacitated for work by events unconnected with the accident for which he is being compensated, e.g., by supervening illness or old age. Once a liability to pay a weekly compensation in view of a degree of incapacity, whether total or partial, is established, the liability continues during the workman's life until the workman's capacity improves. To quote Lord Macmillan (2): "It is now well settled that "a workman who by reason of incapacity due to an accident "is entitled to compensation does not lose that right merely "because, through some extraneous supervening cause, such "as illness or old-age, a natural incapacity is added to the "incapacity due to his accident. The employer cannot plead "that, as the workman would, by reason of his condition "apart from the accident, be incapacitated in any event, he "has lost his right to compensation. There is no merger of "the accidental incapacity in the natural incapacity." *M'Cann's* case (1) approved a similar decision of the Court of Appeal in *Harwood v. Wyken Colliery Co.* (3), in which the observations of Hamilton L.J. (4) are particularly worthy of

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(1) 1936 S. C. (H. L.) 12.

(2) Ibid. 19.

(3) [1913] 2 K. B. 158.

(4) Ibid. 169, 170

H. L. (Sc.) study. I agree with the view of the Court of Appeal in *Thompson's* case (1) that the reasoning in *Harwood's* case (2) equally applies where the supervening cause is a subsequent accident creating total incapacity.

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The liability, therefore, in the present case to pay 15s. a week from February 26, 1943, continues, while the new liability arising out of the accident of April 17, 1944, is not affected by, and the compensation arising from this second accident is not reduced by reason of, the former and independent liability, save so far as the wages earned before the second accident were less by reason of the previous partial incapacity. In this appeal we are concerned with a case in which after the first accident there remained some partial capacity for work, which the workman lost as the result of the second accident. It is not therefore necessary to discuss the complicated problem (illustrated by such decisions as *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (3) and *Evans v. Oakdale Navigation Collieries, Ltd.* (4) which arises when a workman who is receiving compensation for an accident is certified to be incapacitated by industrial disease. It seems to me clear that if a man is already partially incapacitated by accident and then meets with a second accident which incapacitates him altogether the second accident none the less is the event which produces total incapacity. Total incapacity is the condition to which the man is reduced and in which the man is unable to earn any wages. It is immaterial to inquire whether he was previously partially incapacitated or not. We are engaged simply in construing the words of the Act, and to read the relevant sections as though they required credit to be given for continuing compensation for an earlier accident involving partial incapacity, when compensation is claimed for total incapacity arising from a later accident, would as Hamilton L.J. said (5), be "not interpretation but legislation, "unless the context or the scheme of the Act (natural justice "not being in question) demonstrates that the legislature so "intended." In my view, therefore, the decision in *Thompson's* case (1) should be approved, and we should overrule the decision in *M'Kinstrey's* case (6). I move that the appeal be allowed.

(1) [1935] 2 K. B. 90.

(2) [1923] 2 K. B. 158.

(3) [1937] 2 K. B. 426.

(4) [1940] 1 K. B. 702.

(5) [1913] 2 K. B. 158, 169.

(6) 1920 S. C. 75.

LORD THANKERTON. My Lords, the facts of this appeal and the questions at issue have been clearly stated by my noble and learned friend on the woolsack in his opinion, which I have had the privilege of considering, and in which I concur. I will only add a few observations. It has long been settled by a series of decisions of this House that the right to compensation under the Workmen's Compensation Acts is conferred by the statute—at present by s. 1 of the Act of 1925—that the amount of compensation is to be measured, at present by ss. 8 and 9 of the Act of 1925, and that you must not resort to these latter two sections for the purpose of cutting down the right to compensation. Further, the right to compensation thus conferred by the statute is not dependent on an award by the arbitrator or any payment of compensation by the employers. I am of opinion that consideration of s. 1 of the Act of 1925 will provide the key to the solution of the present question. In my opinion—and, indeed, I understood the respondents' counsel as conceding it—the appellant acquired on the occasion of each accident a separate right to compensation in respect of the personal injury caused by the particular accident. If so, the measurement of the compensation in respect thereof will involve a separate measurement in respect of each right to compensation, and ss. 8 and 9 are thus designed to quantify the compensation due in respect of injury caused by the particular accident, in respect of which the statutory right to compensation is acquired; it will follow that the limit of 30s. imposed by proviso (c) of s. 9, sub-s. 1 of the Act will be equally confined to the compensation in respect of the injury caused by the particular accident. There is no statutory provision under which the compensation payable in respect of injury by another accident can be taken into account, and no machinery for aggregation and apportionment of compensation payable in respect of injury from more than one accident whether the employers are the same or not. If there be any hardship on the employers, it is for Parliament, if it thinks fit, to amend the statutory provisions.

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LORD MACMILLAN (read by LORD SIMONDS). My Lords, your Lordships in this appeal have to choose between two conflicting decisions of the Court of Session in Scotland and the Court of Appeal in England on an important point in workmen's compensation law. The appellant on February 15, 1939, while in the respondents' employment, was injured by

H. L. (Sc.) . an accident which totally incapacitated him. He was paid compensation on that footing until he sufficiently recovered to enable him to undertake light work at a lower wage and was thereafter paid in addition to his wages 15s. a week as compensation for partial incapacity. On April 17, 1944, a second accident befell him which totally incapacitated him from work. In respect of this second accident he claimed compensation at the rate of 30s. a week to which he would have been entitled had there been no previous accident and no subsisting weekly compensation for partial incapacity. The appellant maintained his right to both the 15s. a week for partial incapacity due to the first accident and the 30s. a week for total incapacity due to the second accident. This the respondents disputed, founding on proviso (c) to s. 9, sub-s. 1 of the Act of 1925 which provides that "the weekly "payment shall in no case exceed thirty shillings." They accordingly tendered to the appellant in respect of the second accident a weekly payment of 15s. which, with the 15s. being paid to him in respect of the first accident, made up a total weekly payment of 30s. The arbitrator, holding himself bound by the decision of the Second Division of the Court of Session in the case of *M'Kinstrey v. Auchinlea Coal Co.* (1), on the corresponding provisions of the Act of 1906, decided that the appellant was not entitled to both weekly payments concurrently, but was entitled only to payment of 30s. a week in respect of the second accident. On appeal this decision was affirmed by the learned judges of the Second Division, who likewise held themselves bound by *M'Kinstrey's* case (1). The appellant now asks this House to overrule the decision in *M'Kinstrey's* case (1) and to approve and give effect to the contrary view enunciated by the Court of Appeal in England on precisely the same state of facts, in *Thompson v. London & North Eastern Ry. Co.* (2).

Having considered the opinion of Lord Dundas, the only opinion delivered in the Scottish case, and compared its reasoning with the judgments of Lord Hanworth, M.R. and Slesser and Romer, L.JJ. in the English case I have no hesitation in preferring the latter to the former. Lord Dundas finds the key to the whole problem in the proposition that (3) "compensation under the Act is not for a man's injury but "for his incapacity, that that incapacity is one and indivisible

(1) 1920 S. C. 75.

(3) 1920 S. C. 75, 79.

(2) [1935] 2 K. B. 90.

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“ and that it can never be more than total incapacity, however many injuries by accident the man may have suffered from.” In common with the learned judges of the Court of Appeal in England I find no warrant in the Act for this view. The first section of the Act confers on a workman injured by an accident arising out of and in the course of his employment a right to compensation. Where an accident occurs and injury is sustained by a workman the right to be compensated in respect of that accidental injury at once arises and must be assessed on its own merits. Any other accident he may have previously suffered or may thereafter suffer is irrelevant. No doubt the compensation is to be “ in accordance with the provisions hereinafter contained ” and s. 9, sub-s. 1, with its proviso (c) is one of the provisions thereinafter contained, but s. 9 is concerned only with the quantification of the amount of compensation payable in respect of the particular accident. When it provides that “ the weekly payment shall in no case exceed thirty shillings ” it means that in arriving at the weekly compensation payable in respect of the injury due to the accident in question a maximum of 30s. shall not be exceeded. I see no justification for reading the proviso as if it had enacted that no workman shall ever at one and the same time receive more than 30s. a week as compensation under the Act, however often he may have sustained injuries by accidents. Each case as it arises must be dealt with on its own facts and for each case compensation must be awarded as the Act prescribes, subject only to the limit that in no one case of injury shall the compensation exceed 30s. a week. This view is fortified by taking the case where the liability for the first accident has been satisfied by a lump sum payment. There are no means of taking this into account in assessing the compensation for a second accident. Again, take the case of the second accident occurring in employment by a different employer. In that case is the employer to pay less compensation for total disablement because the employee is drawing compensation for partial disablement from a previous employer? The Act imposes no such restriction. As Slessor L.J. says in *Thompson's* case (1): “ The partial incapacity is not so absorbed into the total incapacity that there is but one claim ; there are two separate and continuing liabilities giving rise to two separate claims for compensation.” The views expressed by my noble and learned

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friend Lord Thankerton in this House in the case of *M'Cann v. Scottish Co-operative Laundry Association* (1) lend support to the opinion which I have formed in the present case, though the circumstances were different. There supervening total incapacity due to illness was held to have no effect on an award of compensation for partial incapacity subsisting at the time of the onset of the illness. The appeal should, in my opinion, be allowed.

LORD SIMONDS. My Lords, I concur.

LORD DU PARCQ. My Lords, the question of construction which is now before your Lordships cannot be said to be a simple one, since the appellate Courts of England and Scotland have differed on it. None the less I am of opinion, with deference to those who have thought otherwise, that, if the question is approached with regard only to the words of the Act of Parliament, the answer to it is reasonably plain. Section 1 of the Act provides that if a workman suffers personal injury by accident (I omit words not germane to this inquiry) his employer becomes liable to pay him compensation. The compensation, as is seen from s. 9, sub-s. 1, is to be a weekly payment. The payment is to be made "where total or partial incapacity for work results from the "injury" and is to be payable "during the incapacity." It is to be calculated in accordance with the rules laid down, for cases of "total incapacity" in s. 9, sub-s. 2, for cases of "partial incapacity" in s. 9, sub-s. 3. The Act assumes, not unnaturally, that the workman, immediately before the accident which has injured him, had some capacity for work. It may not have been the complete capacity of a wholly fit and hitherto uninjured man, but such as it was it enabled him to earn wages. When that capacity is diminished or destroyed, so that "total or partial incapacity for work results," the employer in whose service he has suffered the incapacitating injury must compensate him. It does not seem to me to be a misuse of language to say that when a workman loses through an accident all that capacity for work which he possessed immediately before the accident, "total incapacity for work" has resulted from the accident. The rules for calculating the weekly payment are based on a comparison of the workman's earnings before and after the accident, and as the extent of

(1) 1936 S. C. (H. L.) 12, 14.

his capacity will normally be reflected in his wages, compensation may be said to be measured, though no doubt roughly measured, according to the reduction in his capacity for work, by comparison, not with an ideal standard of full capacity, but with that degree of capacity which he possessed before the accident. Thus, where a partially incapacitated man is totally incapacitated by a subsequent accident, the liability of the employer in whose service the man became totally incapacitated is to compensate him by payments based, not on the difference between full earning capacity and total incapacity, but on the depreciation of his earning power attributable to the last accident, by which partial incapacity was converted into total incapacity. When the calculation is made in accordance with s. 9 it may turn out that, but for the operation of proviso (b) to s. 9, sub-s. 1, a weekly payment exceeding 30s. would be due to the workman. The proviso limits the weekly payment to that amount. If I have rightly construed the section thus far, there can be no ground for supposing it to have been the intention of the legislature that when a workman has suffered injuries from successive accidents, the total of the weekly payments he receives in respect of them is to be limited to 30s. Certainly, no such intention is expressed, and I cannot infer it from the words of the Act. On the contrary, it seems to me to be manifest that in s. 9 the legislature is concerning itself solely with the payment to be made by the employer in whose service the workman was when a particular accident befell him. The words of the section are not, in my opinion, ambiguous, but any doubt should, I think, be dispelled by the consideration that, if Parliament had intended that a workman who, after successive accidents, was in the end totally incapacitated, could recover no more than 30s. a week in all, it could hardly have failed to make some provision for the adjustment and apportionment of the liability as between the different employers who might be concerned. There is no trace of any such provision in the Act or in the rules made under it. I only wish to add, with regard to the point raised on the proviso in s. 9, sub-s. 1 (b) that I agree with the interpretation put on that proviso by the Court of Appeal in *Evans v. Oakdale Navigation Collieries, Ltd.* (1). For these reasons, and for the reasons given by the noble and learned Lord on the woolsack,

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H.L. (Sc.) whose opinion I have had the advantage of reading in print,
I would allow the appeal.

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Appeal allowed.

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Solicitors for appellant : *H. S. L. Polak & Co., for Herbert Macpherson, S.S.C., Edinburgh, and C. M. Scott and M'Gillivray, Glasgow.*

Solicitors for respondents : *Beveridge & Co., for W. & J. Burness, W.S., Edinburgh, and J. A. McAra, Glasgow.*

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[HOUSE OF LORDS.]

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RICHES. APPELLANT

Jan. 23, 24,
27, 28 ;
Mar. 21.

AND

WESTMINSTER BANK LIMITED . . . RESPONDENTS.

Revenue—Income tax—Interest awarded in proceedings for recovery of debt—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. D., para. 1 (b) ; All Schedules Rules, r. 21—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 3, sub-s. 1.

A sum of money awarded under the powers conferred by s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, as interest and included in the total sum for which judgment is given is " interest of money " within the meaning of sch. D., of the Income Tax Act, 1918, so that the judgment debtor, when paying the judgment debt, is entitled to deduct income tax on the amount of the award of interest and the judgment creditor must " allow such deduction " on receipt of the balance.

Observation by Wright J. in *In re National Bank of Wales, Ltd.* [1899] 2 Ch. 629, 651 dissented from.

Decision of the Court of Appeal (sub nom. *Westminster Bank, Ltd. v. Riches*) [1945] Ch. 381, affirmed.

APPEAL from the Court of Appeal (du Parcq and Morton L.JJ., and Cohen J.).

The facts, summarized from their Lordships' opinions, were as follows : The appellant, Edward Harold Riches, in the year 1936 entered into an agreement with one Ernest Bramwell Ridsdel under which, in consideration of his introducing to

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD NORMAND.

Ridsdel a transaction which involved the purchase of a block of shares in a certain limited company, Ridsdel was to pay him one half of any profits which might be made upon a sale of the shares. Ridsdel bought the shares and resold them at a profit of 93,350*l.*, but he paid to the appellant sums amounting to 10,420*l.* only, fraudulently pretending that that sum represented the whole of the appellant's share of the profit, which he alleged was no more than 20,840*l.* On April 2, 1939, Ridsdel died and the appellant, having discovered shortly afterwards that the profit was far greater than was alleged, on April 2, 1942, commenced an action in the King's Bench Division against the respondent bank as judicial trustee of Ridsdel's last will in which he claimed (*inter alia*) an account of the profits made upon a resale of the said shares and payment of the difference between the sum already received by him and one half of the profits found to have been made on taking such account. This action was vigorously defended, and on May 17, 1943, Oliver J. gave judgment for the appellant for the sum of 36,255*l.* (being the difference between the sum of 10,420*l.* already received by the appellant and 46,675*l.*, i.e. one half of the profit of 93,350*l.* admittedly made by Ridsdel) together with a further sum of 10,028*l.* (making 46,283*l.* in all) which the learned judge in the exercise of his discretion awarded as interest under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. This sum of 10,028*l.* represented interest at four per cent. per annum on 36,255*l.* from June 14, 1936 (when that sum should have been paid), to May 14, 1943 (the date of judgment). From this judgment the respondents appealed to the Court of Appeal but the appeal was dismissed. In July and August, 1943, the respondents paid the appellant sums amounting to 41,451*l.* 11*s.* 11*d.* made up of the sum of 36,255*l.*, of a sum for interest on the judgment after the date of judgment and of a sum of 5,014*l.*, being the sum of 10,028*l.* included in this judgment as interest after deduction of income tax therefrom at the standard rate then prevailing of 10*s.* in the pound. For this balance of 5,014*l.* the respondents held themselves accountable to the Crown. The respondents made this deduction under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, and it was common ground that the deduction, if permissible, must be made under that rule. The appellant, however, contended that the deduction was not permissible and threatened to levy execution under the judgment unless the balance of 5,014*l.* was paid to him. To avert this event,

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H. L. (E.) the respondents commenced an action in the Chancery Division against the appellant claiming a declaration that the judgment had been satisfied by the payments already made. In this action Evershed J. gave judgment for the respondents. The Court of Appeal unanimously affirmed his decision (1). The appellant appealed to the House of Lords.

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Grant K.C. and *Mustoe* for the appellant. The sum of 10,028*l.* was awarded by the judge in the exercise of his discretion under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which by sub-s. 2, repealed the Civil Procedure Act, 1833, ss. 28 and 29. (Under those sections juries were empowered to allow interest upon debts and in certain actions to give damages in the nature of interest). Interest under s. 3 is of the same character as interest under ss. 28 and 29 of the Act of 1933 which, being an award of damages or in the nature of damages, could not be "annual profits or gains" within para. 1 (a) of sch. D. nor "interest of money" within para. 1 (b) of sch. D.; r. 1 (a) of case III. of sch. D. and r. 21 of the All Schedules Rules of the Income Tax Act, 1918. Accordingly, no deduction under r. 21 would be justified. Even apart from the Act of 1918 there is a clear distinction between (a) interest properly payable under a contract express or implied or in equity, and (b) a payment which, although it may be described as interest, is really damages. Originally English law was hostile to the payment of interest for the use of money or usury: see the Statute 20 Hen. III. c. 5. The medieval world adopted the Aristotelian view of the barrenness of money but from 1545 (see the statute 37 Hen. VIII., c. 9), legislation limited the rate of interest to be charged. Finally came the Usury Laws Repeal Act, 1854. The early idea of interest was that it was a compensation to the owner of the money for being deprived of the use of it: see Blackstone's Commentaries (1766 ed.), Book II., c. 30, p. 455. When it is not payable under a contract it is still a payment in the nature of damages. The sum awarded here is not interest in the true sense but was part of a lump sum and was given as compensation for the detention of money due to the appellant. So, being an indemnity for damage done, it is not income. The appellant thus relies on the following propositions: (a) There is a fundamental difference in quality—not just in the basis of the award—between a sum paid as interest proper and a payment which, though calculated by reference to interest and

(1) [1945] Ch. 381.

even called interest, is really damages for wrongful detention of money: see *Cameron v. Smith* (1); *Cook v. Fowler* (2); *Mounson v. Redshaw* (3); *In re Roberts* (4); *Webster v. British Empire Mutual Life Assurance Co.* (5); *Marsh v. Jones* (6); *Ryley v. Master* (7); *Wilks v. Wood* (8); *London Chatham and Dover Ry. Co. v. South-Eastern Ry. Co.* (9); and Chalmers on Bills of Exchange (11th ed.), s. 57; (b) Further, amounts awarded under s. 3. of the Act of 1934 are in the second category, in that they are really damages. The appellant relies on the similarity of language between that section and the relevant sections in the Act of 1833: see *Webster v. British Empire Mutual Life Assurance Co.* (5); (c) Further, sums which are really damages are not "profits or gains" within the meaning of the Income Tax Act and therefore are not a fortiori "interest" within the meaning of that Act: *In re National Bank of Wales, Ltd.* (10); *Schulze v. Bensted* (11); *Sweet v. Henderson* (12); *Inland Revenue Commissioners v. Ballantine* (13); *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Commissioners* (14); *Simpson v. Maurice's Executors* (15); *Inland Revenue Commissioners v. Barnato* (16); and *Southport Corporation v. Lancashire County Council* (17). Moreover "interest" awarded under s. 3 of the Act of 1934 is never accruing. It has no existence until it is awarded as part of the amount for which judgment is given and does not have the quality of being recurrent or being capable of recurrence, which is an essential feature of interest of money. [They also referred to *In re Kerr's Policy* (18); *Swift & Co. v. Board of Trade* (19); *Moss Empires, Ltd. v. Inland Revenue Commissioners* (20); *In re Craven's Mortgage* (21); *King v. Hoare* (22); *Williams v. Jones* (23); *Grant v. Easton* (24); and *In re European Central Ry. Co.* (25).]

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| (1) (1819) 2 B. & Ald. 305, 307. | (13) (1924) 8 Tax Cas. 595. |
| (2) (1874) L. R. 7 H. L. 27. | (14) (1922) 12 Tax Cas. 427, 464. |
| (3) (1667) 1 Wms. Saund. 185, | (15) (1929) 14 Tax Cas. 580. |
| 201 n. (r.). | (16) (1936) 20 Tax Cas. 455. |
| (4) (1880) 14 Ch. D. 49, 51. | (17) [1937] 2 K. B. 589. |
| (5) (1880) 15 Ch. D. 169. | (18) (1869) L. R. 8 Eq. 331. |
| (6) (1889) 40 Ch. D. 563. | (19) [1925] A. C. 520, 532. |
| (7) [1892] 1 Q. B. 674, 679. | (20) [1937] A. C. 785, 795. |
| (8) [1892] 1 Q. B. 684. | (21) [1907] 2 Ch. 448, 452. |
| (9) [1893] A. C. 429, 442, 443. | (22) (1844) 13 M. & W. 494, 504. |
| (10) [1899] 2 Ch. 629. | (23) (1845) 13 M. & W. 628. |
| (11) 1916 S. C. 188; 7 Tax Cas. 30. | (24) (1883) 13 Q. B. D. 302. |
| (12) 1921 S. C. 92; 7 Tax Cas. | (25) (1876) 4 Ch. D. 33. |

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[VISCOUNT SIMON stated that the House was of opinion that it should be intimated to the Inland Revenue Commissioners that it would be necessary to decide matters which might hereafter affect the Inland Revenue and that they should be asked whether they would accept the decision of the House as binding on them or else appear and contest these matters.]

Mustoe following. There is a contrast between the language of s. 3 of the Act of 1934 where the material word is "interest" and that of r. 21 of the All Schedules Rules where the expression is "interest of money." The latter arises from a contract of loan or from some other legal obligation. But the interest awarded under s. 3 does not satisfy the five tests of Lord Anderson in *Inland Revenue Commissioners v. Hay* (1). Interest payable otherwise than of right is damages. The object of s. 3 is restitutio in integrum and the power given to the court to award interest is destined to enable it to apply that principle. The interest, accordingly, cannot come within the Income Tax Act, since the court is merely giving the appellant a lump sum to compensate him for the income which he has not received. The sum is awarded as damages and, though calculated as interest, it is not itself interest. To be taxable the sum in question must itself be interest. In the use of the word "interest" there is a latent ambiguity: see s. 57 of the Bills of Exchange Act, 1882.

Donovan K.C. and *Graham-Dixon* for the respondent bank. In this action the appellant claimed and was awarded interest. The Act of 1934 by s. 3, sub-s. 1, allows the court to award interest, but does not allow it to award something which is not interest. Accordingly, the award made thereunder in this case must be interest. That is what the Act prescribes and it has been implemented here. If a statute prescribed that a man should get a horse and he was given a camel that statute would not have been implemented. Here the appellant cannot argue that he has been paid interest vis-à-vis everyone except the tax collector or that what was paid to him as interest is not the kind of income taxed by the Income Tax Act, 1918; see s. 1 and para 1. (b) of sch. D. The sum awarded does not so change its character as to cease to be interest. If the contention of the appellants was right no-one would ever make any payment until he was actually sued, since that would be a simple means of avoiding taxation. In any event, interest awarded as damages may still be interest. The definition in

(1) 1924 S. C. 521, 531; 8 Tax Cas. 636, 646.

Mayne on Damages, 11th, ed., p. 1, does not rule out that possibility. When interest is said to be awarded by way of damages, that is merely descriptive of the way in which it is awarded. It is only on the basis of a gap to be filled (i.e., the inability of the court at common law to grant interest on a debt) that s. 3 is really required. There is no ambiguity in its terms. Such interest as was awarded here comes within the expression "all interest of money" in sch. D, para. 1 (b) of the Income Tax Act, 1918, and is liable to income tax thereunder. The interest being paid wholly out of profits and gains not brought into charge to tax, the respondents were bound to deduct tax therefrom on payment and to account for that tax to the Inland Revenue Commissioners under r. 21 of the All Schedules Rules of the Act of 1918 and they were thereby acquitted and discharged of so much of the payment of interest as was represented by the deduction: see *Allchin v. Coulthard* (1). In these circumstances the respondents have satisfied the judgment given against them in the earlier proceedings on May 17, 1943. The terms of ss. 28 and 29 of the Civil Procedure Act, 1833, and the decisions given under those sections do not lead to any contrary conclusion. Arguments founded on those decisions to suggest such a conclusion are erroneous. There is no difference in principle between the present case and *Inland Revenue Commissioners v. Barnato* (2). In any event the House can consider the Act of 1934 unfettered by authority. [They referred to *Jones v. Leeming* (3); *Cook v. Fowler* (4); *Webster v. British Empire Mutual Life Assurance Co.* (5); *Constantinesco v. Rex* (6); *Smith v. Smith* (7); *Aman v. Southern Ry. Co.* (8) and *In re National Bank of Wales Ltd.* (9).]

R. P. Hills for the Crown. It is not the custom of the Inland Revenue Commissioners to intervene in cases between subjects, properly constituted, merely because a tax point is raised, unless they are called on to do so by the court because it wants assistance. The Inland Revenue Commissioners recognize that any decision given in this case is binding on them.

Grant K.C. in reply. The word "interest" in the Act of

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(1) [1943] A. C. 607, 619.

(2) 20 Tax Cas. 455.

(3) [1930] A. C. 415, 419.

(4) L. R. 7 H. L. 27, 30, 37.

(5) 15 Ch. D. 169, 176.

(6) (1927) 11 Tax Cas. 730, 745, 746.

(7) [1923] P. 191.

(8) [1926] 1 K. B. 59.

(9) [1899] 2 Ch. 629, 651.

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Jones v. Leeming (1); *Constantinesco v. Rex* (2) and *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.* (3) do not assist either of the parties. *Inland Revenue Commissioners v. Barnato* (4) is distinguishable because there was there no question of damages. The appellant relies on *Simpson v. Maurice's Executors* (5) and *In re National Bank of Wales Ltd.* (6). [He also referred to *Inland Revenue Commissioners v. Paget* (7).]

THE HOUSE took time for consideration.

Mar. 21. VISCOUNT SIMON: My Lords, the question which the House has to decide has not, it seems, come previously before the courts. It is whether a sum of money awarded, under the powers conferred by s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, as interest, and included in the total sum for which judgment is given, is "interest of money" within the meaning of sch. D. to the Income Tax Act, 1918. If it is, the respondents, when paying the judgment debt, are entitled to deduct income tax on the amount of this award of interest (10,028*l.*), and the appellant must "allow such deduction" upon receipt of the balance, while the respondents will retain what is deducted if he has paid it out of profits or gains brought into charge to tax (r. 19 of the All Schedules Rules), or will account for it to the Revenue, in so far as the payment is not made out of profits or gains brought into charge (r. 21 of the All Schedules Rules).

The appellant contends that the additional sum of 10,028*l.*, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts income tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest. Before the coming into force of the Act of 1934, the rule at common law prevailed that when an action for the payment of a debt succeeded the

(1) [1930] A. C. 415.

(2) 11 Tax Cas. 730, 745, 746.

(3) [1893] A. C. 429.

(4) 20 Tax Cas. 455.

(5) 14 Tax Cas. 580.

(6) [1899] 2 Ch. 629.

(7) [1938] 2 K. B. 25, 44.

court could not add interest on the debt down to judgment unless interest was payable as of right under a contract expressed or implied. Proviso (b) and (c) of s. 3 show that these exceptions were not touched by the Act of 1934 and the discretion conferred on the court by the enacting words is a direction to add interest when judgment is given for a debt or damages, although there is no contractual right to interest. The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest. This is the view taken by Evershed J., and by the Court of Appeal (du Parcq, and Morton L.JJ. and Cohen J.). Notwithstanding Mr. Grant's excellent argument, this view, in my opinion, is correct.

Two decided cases which might seem to give support to Mr. Grant's arguments are *In re National Bank of Wales, Ltd.* (1) and *Simpson v. Maurice's Executors* (2). In the former, Wright J. had before him a case in which an ex-director of the bank had been ordered to pay to the liquidator of the company a sum of money together with interest thereon at 5 per cent. per annum on the ground that he had been guilty of misfeasance in sanctioning the payment of dividend out of capital. The learned judge declined to allow this individual to deduct income tax from the interest he was ordered to pay. He is reported as saying (3), that it is not a question of contract at all and that the order made had the effect that the company had had its capital withheld and had suffered damages equivalent to 5 per cent. per annum for that reason. The learned judge added: "I can see no reason why it should not get the whole of the damages back. It is called 'interest,' but it is really damages for withholding its capital from the company." These observations have long been considered as of doubtful validity and the time has come to say that they are wrong. If damages are increased by adding interest upon a principal sum, that does not prove that such interest is not liable to tax. The case of *Simpson v. Maurice's Executors* (2) was of a very special character. It arose under art. 297 of the Treaty of Versailles after the war of 1914/1918. Article 297 provided that the nationals of Allied and Associated Powers should be entitled to compensation in respect of damage or injury inflicted upon their property rights or

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(1) [1899] 2 Ch. 629.

(3) [1899] 2 Ch. 629, 651.

(2) 14 Tax Cas. 580.

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interests in Germany. Before the war a British subject had deposited securities, stocks and shares in banks in Germany. He died during the war and as a result of the peace treaty claims on the part of his representatives were admitted in respect of amounts representing in part the capital value of those securities and in part compensation under the treaty computed on the basis of interest on certain amounts. The decision of Rowlatt J. that this compensation could not be regarded as interest was confirmed by the Court of Appeal. The treaty did not give to the claimants any right to interest as such and the view taken was that the whole amount was compensation, such as was authorized by the treaty. Rowlatt J. observed (1), that the case was "like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest." I do not consider that this decision can be regarded as leading this House to a conclusion in favour of the appellant.

Mr. Grant advanced a further argument that the added sum was not in the nature of "interest" in the sense of that expression in the Income Tax Acts because the added sum only came into existence when the judgment was given and from that moment had no accretions under the order awarding it. (Interest on a judgment debt is of course a separate matter and Mr. Grant did not challenge the view that this latter interest was subject to tax.) But I see no reason why, when the judge orders payment of interest from a past date on the amount of the main sum awarded (or on a part of it) this supplemental payment, the size of which grows from day to day by taking a fraction of so much per cent. per annum of the amount on which interest is ordered, and by the payment of which further growth is stopped, should not be treated as interest attracting income tax. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment. I move that the appeal be dismissed with costs.

LORD WRIGHT: My Lords, this appeal raises the question whether a sum of 10,028*l.* awarded to the appellant as interest pursuant to s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934 (hereinafter called the Act) and included,

(1) 14 Tax Cas. 580, 593.

pursuant to that section, in the total sum for which judgment in the King's Bench Division was given in favour of the appellant, is "interest of money" within the meaning of para. 1 (b) of sch. D. to the Income Tax Act, 1918, which enacts (inter alia) that "tax under this schedule shall be "charged in respect of . . . (b) All interest of money . . ." (1). The respondents claimed that they had satisfied the judgment by a payment of 41,451*l.* 11*s.* 11*d.* which was arrived at after deduction of 5,014*l.*, representing income tax on the sum of 10,028*l.* pursuant to r. 21 of the All Schedules Rules of the Income Tax Act, 1918. The appellant claimed that income tax was not deductible and the respondents then brought the action out of which this appeal arises, claiming that the payments made by the respondents satisfied the judgment. The dispute involved the question whether the sum of 10,028*l.* was interest under the Act. It clearly affected the rights of the Revenue. The House accordingly gave the Revenue authorities the opportunity of intervening in the proceedings, but they disclaimed any desire to take part and were content to leave it to the decision of the House, which in any case must declare the proper law applicable to the facts.

The main questions in the appeal may be described as being whether the sum of 10,028*l.* awarded as part of the judgment was interest under the Act and if so whether it fell within the words of the charging section of the Income Tax Act, 1918, which have been quoted above. Both courts below (as already stated) answered both questions in the respondents' favour. Their judgments deal so admirably with the issues that I should have been content to agree with them without more, but having regard to the general importance of the questions, I add a brief statement of my reasons for agreeing. The contention of the appellant may be summarily stated to be that the award under the act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due by the respondents to the appellant and hence the deduction made as being required under r. 21 is not justified because the money was not interest. In other words the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. Evershed J. in his admirable judgment rejected that distinction. The appellant's contention is in any case artificial

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and is in my opinion erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under s. 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same and the compensation is properly described as interest. For reasons that go back far in history the distinction between interest proper as it has been called, that is, interest due under a contract, statute or the like, and interest by way of damages, that is, not due under an agreement express or implied, has since very early days been recognized in England whether in the ecclesiastical or common law courts. Moneylending was condemned by the medieval mind as usurious. (R. H. Tawney, *Religion and the Rise of Capitalism*, pp. 54 and 55.) The reproach of usury was not answered by saying the interest was due under a contract. "What remained to the end unlawful" says Tawney, at p. 54, "was interest as a fixed payment stipulated in advance "for a loan of money or wares without risk to the lender." The profits should go, it was said, to the borrower since he makes the loan profitable by his work. These ideas could not survive the exigencies of modern commerce, but they did and still in a sense do, influence the rules relating to interest. The legislature found it necessary to intervene in 1833 by means of the Civil Procedure Act (Lord Tenterden's Act) of that year which qualified the old English rule that *prima facie* money claims do not carry interest. Before that date it had been held as for instance in *Page v. Newman* (1) that a common law court in awarding damages was not entitled

(1) (1829) 9 B. & C. 378.

to award interest in addition in the absence of express or implied contract or statute. The Admiralty Court however claimed and exercised that right. The court of equity also when making a money decree held itself entitled to award interest for the period between the time when the money was due and the date of the decree when it thought that proper in order to effect a *restitutio in integrum*. The Act of 1833 corrected to some extent the limitations of the common law courts' powers in this matter. By s. 28 of that Act the jury were to be entitled, if they should think fit, to allow interest to the successful plaintiff in a limited class of cases, that is, where the debt was a sum certain under a contract in writing payable at a time certain or, if otherwise, made payable by a demand in writing fixing a certain date and notifying the debtor that in default interest would be claimed. Section 29 similarly enabled the jury to give damages "in the nature of "interest" in certain torts and also on claims upon policies of insurance.

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The element of discretion found in the earlier Act was preserved by the Act of 1934. The Act was general in its terms: it made no distinction between interest and damages in the nature of interest. The word indeed was used indifferently. The essential similarity of different types of interest is put beyond doubt by s. 3, sub-s. 1 (b), of the Act which after excluding power to give compound interest provides that the Act is not to apply to any debt where the interest is payable as of right. This would include all cases of what is called interest proper, under a contract or the like, so that the interest particularly dealt with by the Act is what has been called interest by way of damages. The category included in sub-s. 1 of s. 3 (c) of the Act was necessary to exclude interest awarded on the dishonour of a bill of exchange, the award of which, though often described as damages, is now statutory. The award is not in the discretion of the court where the interest is payable as of right. It is clear that the Act used the word "interest" in its widest sense, including both interest proper and interest by way of damages. It is not a consolidating Act, but a reforming or amending Act. It is intended to enlarge the powers of the court. In 1893 this House in the case of *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (1), reviewed the then existing position as it stood at common law and the established

(1) [1893] A. C. 429, 440.

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principle up to that date. Lord Herschell L.C. said that the words of Lord Tenterden's Act (the Act of 1833) confined claims for interest within very narrow limits which to him seemed too narrow for the purposes of justice. But he held that the authorities which he cited made it impossible to reopen the question or to hold that in the circumstances before the House in that case interest could be awarded. The interest in question was an instance of what has been called interest by way of damages. But it may be noted that throughout such interest is still described as interest, even though the court was debarred from awarding it by the then state of the law. The case itself was typical. A large sum of money was due but was not paid for a substantial period. The decision was that as it was not within the express terms of the Act of 1833 no interest could be awarded. The purpose of the Act was to remove the fetters still left under Lord Tenterden's Act and to effect the reform which the Lord Chancellor thought that justice required. In my judgment the Act has done so.

The question that remains is whether the interest is within the scope of the charging words of sch. D to the Income Tax Act 1918, cited above, which charges "all interest of money." In my opinion, there is no incompatibility for this purpose between interest proper and interest by way of damages, especially since the Act of 1934, and, as I think, before that Act. Thus there does not seem to be any reason why the sum in question should not be taxed. I do not repeat the reasoning which I have sought to explain in the earlier part of this judgment. It is true that in *In re National Bank of Wales, Ltd.* (1), Wright J. distinguished damages from interest. The judge held that the debtor should repay 5 per cent. per annum on sums which he had wrongfully withheld. He said (2): "It is called, 'interest,' but it is really 'damages'." If the judge was meaning that such damages were not capable of being treated as interest, he was in my opinion guilty of an error in law, even before the Act of 1934. I do not think it necessary to express any opinion on the actual decision of that case which turned upon its particular facts. The same may be said of various decisions under the Income Tax Act determining whether particular payments were interest within sch. D. The distinction through these cases is whether the payments were payments of profits, that is, were income,

(1) [1899] 2 Ch. 629.

(2) Ibid. 651.

or were payments on capital account estimated in terms of interest. This latter type of case is less frequent in the books ; but a good illustration is to be found in *Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners* (1) in which it was held that the sum there awarded was in truth, though described as interest, only a method of determining the value of the fireclay sterilized in the hands of the company for which it was entitled to compensation. That was a payment on capital account ; it was for the destruction of a capital asset, which was indeed the source of profits but could not be regarded as income. On the other side of the line is the case of *Inland Revenue Commissioners v. Barnato* (2), where the payment was a sum of compound interest which had been made to the taxpayer in commutation of his share of profit in a partnership. It was a sum of profit, not capital. I need not go through the numerous cases which have been cited to illustrate the circumstances under which a sum has been taxed as income or has been held immune on the ground that whether called interest or not it was really a payment on capital account. In regard to some of these decisions opinion may differ as to the exact result arrived at on the facts but they all agree in using the word "interest" and in drawing as the relevant distinction that between capital and income. This distinction depends on substance not on the mere name.

Of some minor contentions which have been raised, I shall briefly advert to one. It was said that the sum in question could not be interest at all because interest implies a recurrence of periodical accretions, whereas this sum came to existence *uno flatu* by the judgment of the court and was fixed once for all. But in truth it represented the total of the periodical accretions of interest during the whole time in which payment of the debt was withheld. The sum awarded was the summation of the total of all the recurring interest items. The objection fails. In my judgment the appeal should be dismissed.

LORD SIMONDS : My Lords, my noble and learned friend, Lord Porter, who is unable to be here, has asked me to say that he has read and concurs in the opinion which I am about to deliver.

My Lords, this appeal, which is brought from an order of the Court of Appeal affirming an order of Evershed J., raises

(1) 12 Tax Cas. 427.

(2) 20 Tax Cas. 455.

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H. L. (E.) for the first time a question of some general importance arising under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.

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My Lords, to me the case appears a very plain one and but for the novelty and importance of the point I should have been content to adopt without further words of my own the reasons and conclusion of the learned judges in the courts below. The question may be simply stated. It is whether, where in an action for the recovery of any debt or damages the court exercises its discretionary power under s. 3 of the cited Act and orders that there shall be included in the sum for which judgment is given interest on the debt or damages, the sum of interest so included is taxable under the Income Tax Acts. I will remind your Lordships first of the provisions of the Income Tax Act, 1918, under which, if at all, this sum is taxable. Under s. 1 of the Act tax is charged on profits and gains described or comprised in the schedules A., B., C., D., E. contained in the first schedule to the Act and in accordance with the rules respectively applicable to those schedules. By para. 1 (b) of sch. D. it is enacted that tax under this schedule shall be charged in respect of "(b) All interest of " money" I do not think it necessary to make further reference to the provisions of the Income Tax Act. It is sufficient to say that in order to attract tax it must be established that the sum in question was income, and that it was that species of profit or gain which answers the description "interest of money." It is convenient now to set out the section of the Act of 1934 under which payment was ordered. It is as follows: "3. (1.) In any proceedings tried in any " court of record for the recovery of any debt or damages, " the court may, if it thinks fit, order that there shall be " included in the sum for which judgment is given interest " at such rate as it thinks fit on the whole or any part of the " debt or damages for the whole or any part of the period " between the date when the cause of action arose and the " date of the judgment: Provided that nothing in this " section—(a) shall authorize the giving of interest upon " interest; or (b) shall apply in relation to any debt upon " which interest is payable as of right whether by virtue of " any agreement or otherwise; or (c) shall affect the damages " recoverable for the dishonour of a bill of exchange. " (2.) Sections 28 and 29 of the Civil Procedure Act, 1833, " shall cease to have effect."

My Lords, I do not think that it could readily have occurred to anyone that interest awarded under this section was not "interest of money" within the taxing provision, were it not that behind it there lies a history to which I must shortly refer. Taken by itself the section provides in unambiguous terms that, where judgment is given for a principal sum, the court may order that it shall be an interest-bearing principal sum. The principal sum is "money" and the interest upon it is "interest of money." I can see no reason why it should not be "interest of money" for the purposes of tax. That the word "interest" is used in no unusual sense plainly appears from provisoes (a) and (b) where it can only have its familiar meaning. It has, however, been urged by counsel for the appellant that this view of the section, simple and straightforward as it is, ought not to be entertained by your Lordships, and, as I have said, he invokes the history of this branch of the law to support his argument. My Lords, while I am ever prepared to consider any statute in the light of pre-existing law, I must admit to a reluctance to be diverted by the shadow of the past from the plain meaning of plain words. So it is that in this case I get little help from the Aristotelian view of the sterility of money or the medieval conception, embodied in some of our earliest statutes, that the increase of money by way of interest is indefensible usury or even from the way in which in statute and in judicial utterance reference is made to "compensation" or "damages," when interest becomes payable otherwise than under a contractual obligation.

The stages of the appellant's argument clearly appear in his formal reasons. They may be thus summarized. First, he says that interest awarded under the Act of 1934 is of the same character as interest awarded under ss. 28 and 29 of the Civil Procedure Act, 1833: second, that interest awarded under those sections was an award of damages or in the nature of damages: and third, that an award of damages or in the nature of damages is not "interest of money" within the meanings of the Income Tax Acts. The first stage in this argument does not carry me far. By sub-s. 2 of s. 3 the relevant sections of the earlier Act are repealed. The character of the interest to be awarded under sub-s. 1 is surely to be ascertained from the words of that sub-section rather than from those of the sections which it supersedes. But, assuming that the later statute is to be interpreted in the light of the earlier one, it can only be to s. 28 that reference

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may be made. It will be observed that in the section we have now to construe, "debt" and "damages" are joined together. Whether the principal sum, for which judgment is given, is in respect of debt or damages, interest may be awarded in respect of that sum. This may be contrasted with the earlier statute, which by s. 28 provided for the allowance of "interest" simpliciter but by s. 29 provided for the giving of "damages in the nature of interest." I should not be prepared to concede that it makes any difference for the purposes of income tax whether a sum of money is called "interest" or "damages in the nature of interest" or "interest in the nature of damages." But the appellant's argument ties him to s. 28 which refers to the allowance of "interest" and nothing else.

I come then to the second stage and ask what is the character of interest allowed under s. 28 of the Act of 1833. Here the argument is that, call it interest or what you will, it is damages, and, if it is damages, then it is not "interest in the proper sense" or "interest proper," expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the court. In the first case it may be called "interest" and in the second and third cases "damages in the nature of interest," or even "damages." But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead.

I will illustrate my meaning by a citation from the speech of Lord Herschell L.C., in *London Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (1): "But, my Lords," he said "the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this

(1) [1893] A. C. 429, 437.

“ reason, that I think that when money is owing from one
 “ party to another and that other is driven to have recourse
 “ to legal proceedings in order to recover the amount due to
 “ him, the party who is wrongfully withholding the money
 “ from the other ought not in justice to benefit by having that
 “ money in his possession and enjoying the use of it, when the
 “ money ought to be in the possession of the other party who
 “ is entitled to its use. Therefore, if I could see my way to
 “ do so, I should certainly be disposed to give the appellants,
 “ or anybody in a similar position, interest upon the amount
 “ withheld from the time of action brought at all events. But
 “ I have come to the conclusion, upon a consideration of the
 “ authorities, agreeing with the court below, that it is not
 “ possible to do so, although no doubt in early times the view
 “ was expressed that interest might be given under such
 “ circumstances by way of damages.” I note in passing that
 what Lord Herschell would fain have done was done by the
 section now under review. But my purpose in citing this
 passage is to show that interest may be none the less interest
 because it is awarded by way of damages. So again in
Webster v. British Empire Mutual Life Assurance Co. (1),
 where a claim was made for interest upon certain policy
 moneys but the policy contained no provision for interest,
 James L.J. said: “ A policy of assurance does not bear
 “ interest. That is conceded on all hands. In itself, there is
 “ neither an express nor an implied contract to pay interest
 “ on the amount payable. Under the Act 3 and 4 Will. 4,
 “ c. 42, whether it comes within any common law principle
 “ or not, anything in the nature of interest can only be given,
 “ in my view, as damages for the wrongful detention of money
 “ which ought to have been paid.” These and similar
 observations, which I might multiply (e.g., in a line of cases
 concerned with “ specially indorsed ” writs, see *Ryley v.*
Master (2)), were cited on behalf of the appellant to show that
 a sum awarded as interest under s. 28 is in essence not “ interest
 “ proper ” but damages. But to my mind the answer is given
 by Evershed J. in his judgment in words which I cannot
 improve upon and therefore adopt (3) “ . . . the proposition
 “ that interest is awarded as damages or by way of damages,
 “ as in the case of *Cook v. Fowler (4)*, imports the justification
 “ for the award or for the rate awarded but does not affect

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(1) 15 Ch. D. 169, 174.

(2) [1892] 1 Q. B. 674.

(3) (1945) 114 L. J. (Ch). 164, 169.

(4) L. R. 7 H. L. 27.

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"the quality of interest as such" Perhaps the position may become even clearer if for "damages" the word "compensation" is substituted. It would be difficult, I suppose, in a case where a man, being deprived of the use of his money, was awarded interest by way of compensation, to say that what he was awarded was not interest but something else. That is the very language of equity: cf. *Vyse v. Foster* (1). In that case, as James L.J. points out (2), the executors or trustees had committed a breach of trust by allowing trust money to remain outstanding on the personal security of persons engaged in trade; they were bound therefore to make good the trust funds and interest. The language that James L.J. employs is illuminating. "This court," he says (3), "is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing anyone." The trustee must pay interest to compensate his cestui qui trust for the interest (I say nothing of his alternative remedy) he has lost. It might equally well be called damages or interest by way of damages. It is inherently a sum of money of precisely the same character as the interest awarded in a court of law under the Civil Procedure Act, 1833.

My Lords, having discussed in a general way the nature of a sum of money awarded as interest under s. 28 of the Civil Procedure Act, I turn to the cases decided under the Income Tax Acts to see whether they assist the appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature: that is the test for income tax purposes, not whether it is called "interest" or "damages." Thus in *Inland Revenue Commissioners v. Ballantine* (4), arbitrators to whom a claim for (inter alia) "additional costs, loss and damages" was referred awarded an amount which included a sum described as interest. The Court of Session, having concluded that what was described as interest was in fact part of the total sum awarded by way of damages, rejected the claim of the Revenue to tax upon it. As Cohen L.J. has said (5), the matter is summed up in the judgment of the Lord President where he says (6): "If the decree was substantially one of damages, the interest

(1) (1872) L. R. 8 Ch. 309.

(2) Ibid. 328.

(3) Ibid. 333.

(4) 8 Tax Cas. 595.

(5) [1945] Ch. 381, 399.

(6) 8 Tax Cas. 595, 612.

"ordered to run on it was just part of the damages, and not "therefore chargeable to income tax." Again in *Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners* (1) the claim to tax was rejected because, though certain sums were described as interest, yet in substance a capital sum of compensation was awarded, the element of interest being introduced in modum æstimationis. So also in *Simpson v. Maurice's Executors* (2) tax was held not to be exigible upon any part of a sum which was paid by way of compensation under art. 297 (e) of the Treaty of Versailles. It is sufficient to cite a sentence from the judgment of Lawrence L.J. in that case to show how different were its circumstances from those where interest was allowed under the Civil Procedure Act, 1833, or is ordered under the Act of 1934: "Article 297 "of the Treaty " he said (3) " says nothing about the payment " of interest, and the money paid under the direction of the " Mixed Arbitral Tribunal was paid as compensation and " not as interest."

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Numerous cases also were cited which fell on the other side of the line, i.e., in which sums of money described and paid or received as interest were held to be "interest of money" and taxable as such. I will mention only two of them. In *Schulze v. Bensted* (4) the question was as to the liability to tax of interest on a sum which a negligent trustee had failed to get in and which he had been ordered to make good to the trust estate, a state of affairs strictly comparable with that to which I referred when observing upon *Vyse v. Foster* (5). The trustee having duly paid the interest, it was, in the words of Lord Johnston (6), "a surrogatum for that which ought "to have termly reached the hands of the trustees and have "been applied by them as income." It was accordingly liable to tax. In the case of *Inland Revenue Commissioners v. Barnato* (7), the circumstances were very similar. There too the defendants became bound under a consent order founded on certain admissions, to pay not only a principal sum but interest upon it, and compound interest at that. And it was held that such interest was liable to tax. This decision, if I may say so with respect, was plainly right. It illustrates the proposition that that which reaches the hand

(1) 12 Tax Cas. 427.

(5) L. R. 8 Ch. 329.

(2) 14 Tax Cas. 580.

(6) 1916 S. C. 188, 192; 7 Tax

(3) Ibid. 605.

Cas. 30, 34.

(4) 1916 S. C. 188; 7 Tax Cas. 30.

(7) 20 Tax Cas. 455.

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of the recipient as interest upon a principal sum is income liable to income tax, notwithstanding that it may come to him in a single sum and as the result of a hostile suit. I have left to the last a case rightly relied on by the appellant. I refer to *In re National Bank of Wales, Ltd.* (1). In that case a director having been found liable to refund to the company the principal sum of 37,000*l.* (being the amount of certain dividends improperly paid out of the funds of the company) was ordered also to pay interest at the rate of 5 per cent. from the dates when the dividends were paid. A question arose upon settling the minutes of judgment whether income tax should be deducted from the interest so ordered to be paid. Wright J. declined to allow tax to be deducted saying that (2) it was not a question of contract at all, that the matter must be regarded as if the director had fraudulently given away 37,000*l.* of the capital of the company, that the company had by its capital being withheld all those years suffered damages equal to 5 per cent. per annum and that he saw no reason why it should not get the whole of the damages back. He concluded (3): "It is called 'interest,' but it is really damages "for withholding its capital from the company. I have tried "to find some authorities on the question, but I am unable "to find any." I agree with counsel for the appellant that, if this case was rightly decided, he is entitled to succeed here. But the reasoning of Wright J. cannot in my opinion be supported and his decision must be overruled.

It was further urged on behalf of the appellant that the interest ordered to be paid to him was not "interest of "money" for the purpose of tax because it had no existence until it was awarded and did not have the quality of being recurrent or being capable of recurrence. This argument was founded on certain observations of Lord Maugham in *Moss Empires, Ltd. v. Inland Revenue Commissioners* (4), in regard to the meaning of the word "annual." It would be sufficient to say that we are here dealing with words in the Income Tax Act which do not include either "annual" or "yearly," but in any case I do not understand why a sum which is calculated upon the footing that it accrues *de die in diem* has not the essential quality of recurrence in sufficient measure to bring it within the scope of income tax. It is surely irrelevant that the calculation begins on one day and ends on

(1) [1899] 2 Ch. 629.

(3) *Ibid.* 629, 651.(2) *Ibid.* 651.

(4) [1937] A. C. 785, 795.

another. It is more important to bear in mind that it is income.

Finally it is right to say a very few words upon a point taken by du Parcq L.J. in his judgment and for that reason, but, as I understand it, for that reason only, put forward in this House on behalf of the appellants. The learned Lord Justice (1) expressed a doubt, which argument did not dispel, whether a defendant, who is required by the order of the court to pay a judgment debt for a fixed sum (which includes interest), can be said to be making a payment of interest when he pays that sum. The liability to pay interest, he suggested, is superseded by, or merged in, the judgment debt. This opens an attractive vista, e.g., to mortgagees, who, by persuading their mortgagors to allow judgment to be recovered against them for the interest from time to time due, might thus escape liability to tax upon that interest. But with great respect to the learned Lord Justice I do not think that the suggestion is well founded. No doubt for some purposes an obligation of lower degree is merged in one of higher degree, a doctrine presumably based on the policy of avoiding multiplicity of suits. But I do not think that this has any relevance as between third parties, as e.g., between the creditor and the Crown when the question is whether a certain sum is capital or income and if income whether it is taxable income in the hands of the creditor. The question is the same and must be determined by the same considerations whether the sum is paid voluntarily or under an order of the court.

I would add that, having had the privilege of reading the speech which my noble and learned friend, Lord Normand, is about to deliver, I wish to express my concurrence in his observations upon the cases decided by the Court of Session upon this subject. In my opinion this appeal should be dismissed.

LORD NORMAND: My Lords, I respectfully agree with the opinion of my noble and learned friend on the woolsack and also with that of my noble and learned friend Lord Simonds. I propose merely to add some observations on the Scots law as it is affected by the decision in this appeal and on the Scots cases cited by counsel. Claims for interest may arise in Scots law *ex pacto*, *ex lege* or *ex mora*. Interest *ex pacto* is beyond question income in the hands of the recipient. The

(1) [1945] Ch. 381, 389.

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same may be said of interest *ex lege*, and it was so decided in *Sweet v. Henderson* (1). Interest *ex mora* corresponds to the interest awarded to the present appellant under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. That interest ran from the date at which the principal sum was first wrongfully withheld from the appellant and it is wrongful retention of the debt from the creditor that is the legal ground for an award of interest *ex mora* in Scotland: per Lord Westbury in *Carmichael v. Caledonian Ry. Co.* (2). The correspondence is not complete; for example, interest is awarded by the Scottish courts as of right, whereas in England the award depends on the exercise of a discretion which the statute has committed to the jury or the court. Nevertheless the principle of the decision in this appeal will apply to interest awarded *ex mora* in Scotland. The retention of the principal sum in the present instance was fraudulent, but the award of interest either under the statute in England or *ex mora* in Scotland does not depend on proof of fraudulent retention or of negligent retention of the principal. The commonest example indeed of an award of interest *ex mora* is a decree for interest from the date of citation in an action in which the pursuer has successfully sued for the disputed amount due to him on an open account, where there is neither averment nor proof of fraud or negligence (*Blair's Trustees v. Payne* (3)). The wrongful withholding is then merely the refusal of the creditor's demand contained in the summons and the implied denial of his right. Even when there is no proof of fraud or negligence the interest awarded is sometimes spoken of as damages both in England and in Scotland. But in Scotland at least it would, I think, be more appropriately described as compensation. This matter of terminology is, however, of no great importance, for the liability of a payment to income tax does not depend on whether or not it is a payment of damages, but on whether or not it is received as income. The interest payments which were the subject of litigation in *Schulze v. Bensted* (4) had been decerned for in an action (*Lees' Trustees v. Dun* (5)) raised by trustees against the representatives of a deceased trustee on the same estate. It was an action of damages based on negligence. In allowing the Revenue's claim to income tax on this interest, the Lord President cited

(1) 1921 S. C. 92; 7 Tax Cas. 640.

(4) 1916 S. C. 188; 7 Tax Cas. 30.

(2) (1870) 8 M. (H. L.), 119, 131. (5) 1912 S. C. 50.

(3) (1884) 12 R. 104.

with approval (1) the definition of "interest" in Bell's Dictionary, "interest of money may be defined to be the "creditor's share of the profit which the borrower or the "debtor is presumed to make from the use of the money," and he treated the interest awarded as the just recompense to the creditors for being deprived of the use of the money or in other words as interest awarded *ex mora*. He held accordingly that this interest was received by the creditors as the fruit or income of the principal sum which ought to have been paid to them on the date from which the interest ran. Lord Johnston, agreeing with the Lord President's conclusion said (2): "When it" (the interest) "reached the "hands of the trustees it was a surrogatum for that which "ought to have termly reached the hands of the trustees "and have been applied by them as income, in which case it "would have been subject to income tax, and when it did "reach their hands I think they were equally bound to apply "it in accounting with the beneficiaries as income, and I am "unable to see any sound reason for holding that it did not "become liable to income tax in the hands of the trustees "when received." Lord Johnston in the course of his opinion took occasion to say (2) that where a pursuer recovers damages with interest from the date of decree, he did not think that that interest was chargeable. I do not agree with Lord Johnston on this point, and I am of opinion that in such a case the interest, even if it is properly to be considered as part of the damages, is nevertheless received as income by the creditor in the judgment debt. However that may be, *Schulze v. Bensted* (3) is authority for the proposition that interest awarded *ex mora*, even in an action of damages, is income and not capital in the hands of the creditor and is subject to income tax. In short it decided practically the same point as has arisen in the present appeal and it decided it in accordance with the opinion which has been expressed by my noble and learned friend.

There are cases in which a calculation of interest is used as a means of arriving at a capital sum of damages. *Inland Revenue Commissioners v. Ballantine* (4) is an example. In that case an arbiter having a duty to award a sum as com-

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(1) 1916 S. C. 188, 191; 7 Tax
Cas. 30, 33.

(2) Ibid. 188, 192; 7 Tax. Cas.

30, 34.

(3) Ibid. 188; 7 Tax Cas. 30.

(4) 3 Tax Cas. 595.

H. L. (E.) compensation for "outlays and loss" assessed it in the form of annual interest, and it was held that, though the compensation was described as interest and though it was calculated as interest is calculated, the creditor received it as capital. Similarly, in *Glenboig Union Fireclay Co. v. Inland Revenue Commissioners* (1), a sum received by a company as compensation for deprivation of a capital asset and calculated on the basis of the annual profits which the company might have expected to earn by exploiting the asset was treated as a capital sum. But while there may be difficulty in deciding in particular cases whether a payment described and calculated as interest is not in truth a capital payment, it is now settled that interest awarded ex mora, whether it is to be regarded as damages or not, is income of the creditor.

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Appeal dismissed.

Solicitors for appellant : *Last, Riches & Co.*

Solicitors for respondent : *Kenneth Brown, Baker, Baker.*

(1) 12 Tax Cas. 427.

[PRIVY COUNCIL.]

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 1947 AND ANOTHER. APPELLANTS ;
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 ALI AND OTHERS RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF PALESTINE,
 SITTING AS A COURT OF APPEAL.

*Palestine—Contract—Sale of land—Contract of indemnity—Breach—
 Measure of damages—Ottoman Code of Civil Procedure, art. 112.*

The respondents agreed to sell certain land to one H., who paid
 £P.675 in part payment of the purchase price and certain additional

* *Present* : LORD UTHWATT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

sums, and by the contract the respondents undertook to pay H. £P1,000 by way of liquidated damages if they breached the contract. The land was not transferred to H., and later the respondents undertook to sell the same land to the appellants by an agreement which provided, *inter alia*, that the appellants would indemnify the respondents against all claims made by H. up to a total of £P.2017. After completion of the sale by the respondents to the appellants, H. sued the respondents for damages for breach of contract and obtained judgment, and an order for payment of the judgment debt by instalments. The appellants paid one instalment of £P.20, and to enforce his judgment H. obtained an order for the sale of other land belonging to the respondents, which was sold in execution proceedings—after the commencement of the present proceedings but before the case was heard—at a price substantially below its value, and out of the proceeds H.'s judgment debt and interest were satisfied. On this claim by the respondents against the appellants for damages for breach of contract,

Held, first, that art. 112 of the Ottoman Code of Civil Procedure was not applicable in assessing the damages so as to limit them to interest only. The contract was in substance one to indemnify and might well be performed by satisfaction of H. otherwise than by payment of money, and a contract such as the present which, on breach, gave rise to a claim for unliquidated damages, was not an undertaking which amounted to a payment of money within the meaning of art. 112.

Held, secondly, that in the circumstances the loss resulting from the execution sale—the difference between the value of the land and the price for which it was sold—was not too remote and was also to be taken into account in assessing the damages recoverable.

Judgment of the Supreme Court of Palestine varied.

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APPEAL and cross-appeal (consolidated) (No. 69 of 1944) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (January 29, 1943) which varied a judgment of the District Court of Jerusalem (October 2, 1942).

The questions raised by this appeal and cross-appeal arose out of a contract made between the parties, dated December 20, 1936, for the sale of a parcel of land, "Kitat el Satel," by the respondents to the appellants. The two main questions were whether there had been any breach of the contract by the appellants, and, if so, what was the measure of damages.

The District Court of Jerusalem awarded the respondents £P.4997 by way of damages, and that sum was reduced to £P.3193 by the Supreme Court of Palestine (Copland J.). In this appeal the appellants sought to have the judgment below set aside altogether, and the respondents, in their cross-appeal, asked for the judgment of the District Court to be restored.

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The facts and the relevant terms of the contract appear from the judgment of the Judicial Committee.

1947. Feb. 10, 11, 12. *Quass* for the appellants. There was no breach of the contract, but if there was, both courts below have gone completely wrong in regard to the assessment of damages. It is wrong in law to say that in the circumstances the appellants can be held liable for the fact that other land belonging to the respondents was sold in the execution proceedings at very much less than it was worth. The substantial question is whether that loss to the respondents is recoverable from the appellants as flowing from their breach. The appellants paid to the respondents the full consideration for the land. The contract for sale was superseded by the deed of transfer, and the only way the respondents could seek to displace the binding character of their admission in the deed of transfer that they had received £P.3328.500 as full consideration money was by requiring the appellants to take an oath under art. 1589 of the *Mejelle*: if there is no fraud that is the only way in which the matter can be tested: *Shafiqah Bint Jamal Eddin Dasuki v. Sadr Eddin Et-Tibi* (1). [On the point of "admissions" reference was also made to arts. 79 and 1588 of the *Mejelle*.] *Michel Habib Raji Ayoub v. Sheikh Suleiman El Taji El Farouqi* (2) decided that by reason of the Palestine Order in Council, 1922, the English law of penalties should be applied to Palestine. Assuming that this was a contract of indemnity, and assuming that everything is proved properly against the appellants, and assuming that they have failed to pay money due from them under the contract, all that could be recovered from them under a contract of indemnity in these terms for the failure to pay is the sum of money which they have not paid plus interest, and nothing else: *Mayne on Damages*, 11th ed., pp. 9-10. If it is accepted that the sale of the respondents' land flowed from the appellants' failure to implement the bargain, it is still bad law to say that the resulting loss to the respondents can be recovered: the damage is too remote. In any event, if there was a breach, it was the breach of a monetary obligation and under art. 112 of the Ottoman Code of Civil Procedure no damages other than interest are recoverable.

Sir Valentine Holmes K.C. and *T. G. Roche* for the respondents.

(1) [1945] A. C. 214.

(2) [1941] A. C. 274.

The respondents take their stand on the judgment of the trial judge. With regard to the effect of the admissions, the course of the case is very important in considering what exactly is the effect of the deed of transfer. On the wording of the contract and deed and the facts of this case the deed does not preclude the respondents from recovering on the indemnity clauses of the contract. The contract contained numerous provisions, and it is clear that the deed is by itself no admission that the purchasers had performed all their obligations under the contract, nor can it be suggested that the deed of transfer superseded the contract. Even if, contrary to the vendors' submissions, the deed did constitute a formal admission which would otherwise defeat the respondents' claim, it was open to them under the provisions of the Ottoman Code to cross-examine the appellants, and if they obtained admissions from them that the receipt clause was not correct, then the vendors would no longer be bound by the admission in the deed and the judge could hear evidence and determine the case on the merits; the purchaser Stawri Sliheet made such admissions, namely, that the £P.3328 in the deed was not the whole consideration, and that the actual sum paid to the vendors was not £P.3328. Having once made such admissions, the matter became one for the judge to decide on the merits, and the judge's findings on the evidence and his judgment in favour of the vendors were correct. [Reference was made to *Matar v. Sayegh and Another* (1).] On the question of damages, art. 112 of the Ottoman Code of Civil Procedure clearly refers to a contract which sounds in debt and has no application here. Under the sale contract the appellants undertook to meet claims by Haski, and to protect the respondents against claims and the consequences. If there is a breach the remedy must be in damages. This is not strictly indemnity at all. The damages, it is submitted, flow naturally from the breach. There are concurrent findings of the fact that the forced sale resulted in a loss to the respondents of £P.2883. The trial judge assessed the damages on the rights basis; there is nothing to indicate that either court below has taken any wrong view of any principle of law.

T. G. Roche followed, and referred to *Edmunds v. Wallingford* (2).

Quass replied. If the breach complained of is an obligation to pay money, which, assuming there was a breach, is the case

(1) (1935) 2 Pal. L. R. 294.

(2) (1885) 14 Q. B. D. 811, 814.

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here, the only remedy in damages in Palestine is interest on the money obligation that has been broken. [Reference was also made to *British Union and National Insurance Co. v. Rawson* (1).]

June 12. The judgment of their Lordships was delivered by LORD UTHWATT. These are appeals from the judgment, dated January 29, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal, varying the judgment, dated October 2, 1942, of the District Court of Jerusalem. The action was an action for damages for breach of contract. The District Court awarded to the plaintiffs the sum of £P.4997 by way of damages. The Supreme Court reduced the damages to £P.3193.670 mls. The questions at issue under the appeal and cross-appeal relate to the existence of liability under the contract in suit and the damages proper to be awarded. The plaintiffs seek to have the judgment of the District Court restored. The defendants deny liability and contend further that, if they are liable, both Palestinian courts assessed damages on a wrong principle.

The questions arise out of a contract for sale of land. The appellants (defendants in the action) were the purchasers under the contract, and will be referred to as "the purchasers." The respondents (plaintiffs in the action) are as to some of them the vendors under the contract and, as to the rest, heirs of deceased original vendors. Nothing turns on the succession of interest and the original vendors and the respondents will be referred to as "the vendors."

The material facts are as follow: It appears that in 1933 the vendors agreed to sell certain land to one, Haski, who paid £P.675 in part payment of the purchase price. By the contract they undertook to pay Haski £P.1000 by way of liquidated damages if they breached the agreement. In addition to paying the £P.675, Haski paid £P.75 in respect of taxes on the land and commission of £P.300 to one of the original vendors and Yousef, a son of an original vendor. The land was not transferred to Haski and, on December 20, 1936, the vendors entered into the agreement to sell the same land to the purchasers. The sale agreement (in which the purchasers are the party of the first part and the vendors are the party of the second part) first recites the area of the property (5,793 sq. pics 25c.), the transaction with Haski and an agreement to sell in consideration of 400 mls. per sq.

pic, less the £P.675 paid by Haski. It then recites as part of the consideration the following intended obligation of the purchasers :—

“ 2. To guarantee to Yacoub Haski or any person in his stead the liquidated damages, namely £P.1000 together with the sum of £P.675 paid by Yacoub to the second part out of the purchase price, which was accounted for the second part, and the sum of £P.75 which was paid by the said Yacoub for Werko on behalf of the second part, and £P.300 which was received by Mohd. Ali, one of the persons constituting the second part, and by Yousef Mohd., the son of Fatmeh, one of the persons constituting the second part, for their intervention in the sale of the same land to Yacoub Haski as aforementioned, in case Mr. Haski claimed the said sum from both of them and was legally proved, and to guarantee all the rights and damages which may be incurred by the second part in respect of the said agreement and what followed.”

Clauses 1, 2, 3, 7 and 8 of the agreement are as follow :—

“ 1. The second part undertakes to sell and transfer to the name of the first part at the Land Registry the above whole plot of land known as Kitat el Satel, provided that its area be not less than 5,793 square pics according to the plan which is at the Tabu, for the price of 400 mils. each square pic and for the consideration mentioned in the preamble provided that the transfer takes place within a week after the removal of all the attachments and encumbrances existing on the land or which may arise or at any time the first part requires this after the removal of all the said encumbrances.

“ 2. The first part undertakes to accept the transfer and to pay the second part immediately when the transfer of the land into his name is effected, the sum of £P.1642. 200 being the remainder of the purchase price of the whole plot of land taking into consideration the amount of £P.675 paid by Haski out of the purchase price and received by the second part and which sum the first part guaranteed unto him together with other guarantees imposed on him and referred to in the preamble.

“ 3. In the event Yacoub Haski or his representative claims from the second part and from the said Yousef a son of one of them, the amount which they received as aforesaid

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“ and the said liquidated damages, the first part undertakes
“ to guarantee and to pay all these amounts on behalf of the
“ second part on condition that they will not exceed the
“ amount of £P.2017 excepting the expenses, costs and
“ advocate’s fees and provided that the first part will have
“ no right of recourse against the second part and Yousef
“ the son of one of them for any part of the amounts as they
“ form part of the consideration in accordance with their
“ agreement from now.”

“ 7. The second part undertakes not to sign any papers or
“ undertakings to Mr. Yacoub Haski or anyone else which
“ may affect this plot and undertakes in the event of being
“ sued as aforementioned to notify the first part of it and he
“ is not entitled to appoint any advocate in the circumstances
“ in which it is deemed necessary without the consent and
“ will of the first part on condition that all expenses and fees
“ and advocate’s fees required to oppose the claim and action
“ arising therefrom in case the action is brought before the
“ courts, must be paid by the first part.

“ 8. In order to secure the enforcement of the conditions
“ of this agreement the first part undertakes not to let anyone
“ be acquainted with the conditions of the agreement, nor to
“ assign it to any one, nor to give a copy of same especially
“ to the persons having connexion with the second part, in
“ respect of the land.”

Clause 10 contained a stipulation for the payment of £P.3000 by way of liquidated damages in the event of any breach by the purchasers of their obligations under the agreement.

Following on the agreement a petition, signed by the vendors, was presented by them to the Land Registry asking the consent of the Administration to the sale therein described. The material clauses are as follows: “ The aforesaid [i.e., the
“ vendors] have agreed to sell the said property for the sum of
“ £P.3328 and 530 mils. to Messrs. Muhammad Issa El Sheikh
“ Ahmad and Stawri Sliheet, of Jerusalem, in equal shares.

“ We hereby apply for the consent of the Administration to
“ the sale and we request that the said property be registered
“ in their names in accordance with a deed of sale to be
“ executed by us.

“ And the said purchasers have agreed to purchase the said
“ property for the sum above-mentioned and we hereby request
“ that the said property be registered in the names of Muhammad

" Issa El Sheikh Ahmad and Stawri Sliheet in equal shares.

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" And we the signatories to this document declare that all the above statements are true, that the consideration is truly and fully stated, and that, except as disclosed above, we are acting for ourselves alone and for no other person."

On December 31, 1936, the land was transferred to the purchasers. The transfer deed witnesses that " in consideration of the sum of £P.3328.530 mils. paid by " the purchasers to the vendors " the receipt of which sum the said vendors on behalf of themselves and as agents hereby acknowledge " the vendors transfer the land to the purchasers. It concludes with the following declaration : " And the said vendors and the said purchasers declare that the consideration money expressed to have been paid is the true and full consideration money paid in respect of the sale."

In January, 1937, Haski sued the vendors for damages for breach of the contract for sale with him. In accordance with cl. 7 of the contract the vendors reported the matter to the purchasers, who appointed lawyers for the defence. The fees of the advocates were paid by the purchasers. Haski obtained judgment for £P.830 (stated by the judge to be the amount proved to have been paid by him in respect of the land) and £P.1000 liquidated damages. The judgment is dated March 28, 1938. Following on the judgment Haski obtained an order for payment of the debt by instalments. One instalment only was paid. That amounted to £P.20 and was paid by the purchasers. Evidence given on behalf of the vendors was to the effect that they did not pay because that was the purchasers' affair and, in any event, they had no money with which to pay. Haski then took steps to enforce his judgment against the vendors and, in due course, obtained an order for sale of land belonging to them. The land was sold in the execution proceedings and realized £P.3660. Out of the proceeds Haski's judgment debt and interest were satisfied. The land was sold after the commencement of these proceedings brought by the vendors against the purchasers but before the case was heard.

In March, 1941, the vendors instituted the proceedings with which their Lordships are concerned. The vendors pleaded the contract, the failure to pay Haski and Haski's judgment, and alleged that, by reason of the execution proceedings taken

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by Haski damage was thereby being caused to them. Their claim for damages was quantified as follows: (a) £P.1997 (i.e., £P.2017 less £P.20 paid to Haski under the judgment by the purchasers). (b) £P.3000 as agreed and liquidated damages. The amount claimed was, therefore, £P.4997. The purchasers by their defence joined issue on the allegation contained in the statement of claim, and pleaded that they had paid full consideration for the land. The claim for £P.3000, they submitted, was a penalty.

Their Lordships find it unnecessary to deal in detail with the proceedings at the trial. The purchasers set up a substantive case (which they had not pleaded) to the effect that there had been an oral variation of the contract under which an additional sum was agreed to be paid to the vendors in lieu of the indemnity against Haski's claims. That additional sum, according to the evidence, was paid, and the difference between the contract price and the money consideration mentioned in the deed of transfer was part of the total sum paid. That total sum, in the course of the evidence of Stawri Sliheet, one of the purchasers, varied. From time to time different elements entered into its composition and occasionally the rules of arithmetic had to be neglected to produce the desired result. The judge rightly refused to accept the story and, faced with the purchasers' substantive case, found as a fact that only £P.1642 was paid on the occasion of the sale. The judge further found that the value of the property of the vendors sold in execution for £P.3660 was £P.6543. He accepted the evidence that in a court sale by public auction in execution proceedings the full value was very seldom realized. That was, he held, common knowledge. The purchasers, doubtless, were aware of this, for one of them in association with a third party thought the circumstance of a court sale warranted his making an opening bid of £P.960. The loss, the judge held, was a direct result of the breach of contract. The judge took the view that he was not precluded by the terms of the deed of sale from deciding the case on the effect of the evidence. He further held that the sum of £P.3000 mentioned in cl. 10 of the sale contract was a penalty, and no one doubts that he was right in so holding. He assessed damages as follows. He first awarded the vendors the maximum amount of the indemnity, £P.1997 (i.e., £P.2017 less £P.20 paid by the purchasers to Haski). He then proceeded to assess the other damages as follows :—

Value of property sold in execution	£P.6543
Deduct sum received on sale	£P.3660
Less amount paid to	
Haski	£P.2279.642
After subtracting	
amount of indemnity	
otherwise awarded	2017
	262.642
	262.642
	3397.358
	3397.358
	£P.3145.642

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Of this sum of £P.3145.642 the vendors waived £P.145.642 so as to reduce the damages under this head to the figure of £P.3000 mentioned in the statement of claim. In the whole, therefore, the vendors recovered £P.4997.

From this decision the purchasers appealed to the Supreme Court. The points argued appear to have been confined to the question whether oral evidence was admissible to rebut the admission contained in the deed of transfer and to the question of damages. The court was of the opinion that the trial judge erred in admitting evidence to contradict the terms of the deed of transfer and that the vendors were estopped from denying that they had received £P.3328 in cash. The court further held that the vendors were not estopped from suing on the indemnity clauses contained in the contract. The court, however, took the view that the vendors must be taken to have received on account of the indemnity the difference between £P.3328 and £P.1642, the contract price for the land. That difference amounted to £P.1686.300. They could therefore recover only £P.2017 (the amount of the indemnity) less the set-off of £P.1686.300 and the £P.20 paid by the purchasers. The result was that the purchasers on this head were awarded £P.310.670 in place of the £P.1997 awarded by the trial judge. In respect of the breach of the contract for indemnity the vendors were held to be entitled to damages assessed as follows :—

Value of property sold in execution	£P.6543
Less price obtained at sale	£P.3660
	£P.2883

The total sum awarded therefore amounted to £P.3193.

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The appeals before their Lordships were argued on lines which appear to be in some respects different from those pursued in the courts below, though addressed to the same end. The purchasers contend that the sale agreement cannot by reason of the admissions in the sale petition and the deed of transfer be proved. The vendors dispute the conclusive effect in law of those admissions and further contend that in light of the substantive case put forward at the hearing by the purchasers those admissions cannot be relied on by the purchasers. Second the purchasers contend that, assuming the agreement can be proved, no damages other than interest are recoverable, and if they are wrong on that, that the damages claimed in respect of the loss on the execution sale are too remote. Both these contentions are disputed by the vendors. The vendors and purchasers are agreed on the point that the £P.3000 provided for in cl. 10 of the sale agreement is a penalty and not recoverable.

Their Lordships now turn to consider the contentions put before them. The first contention of the purchasers is based on arts. 79 and 1588 of the Mejlle. They contend that the petition of sale and the deed of transfer contain admissions which bind the vendors and negative a sale on terms which contradict the terms of sale as gathered from those documents. Proof of the contract containing the stipulation sued upon was therefore precluded. In their Lordships' opinion the petition for sale and deed of transfer must be considered separately. The petition for sale contains a statement that the vendors had agreed to sell the property for the sum of £P.3328.530 and a declaration made by all the signatories, who included both the vendors and purchasers, that the consideration was truly and fully stated. It may be that on its true construction the petition for sale, like the deed of transfer founded upon it, refers only to the cash consideration and not to the guarantees. But, however that may be, the petition for sale was neither pleaded nor relied on in the lower courts as an admission by the vendors in favour of the purchasers, and their Lordships are not prepared to allow the point to be taken at this stage. The petition may therefore be disregarded for all purposes.

As respects the deed of transfer the admission contained in it is that the land was conveyed in consideration of £P.3328.530 received by the vendors. This is followed by a statement that the "consideration money" expressed to be paid is the

true and "full consideration money" paid in respect of the sale. Their Lordships are content to proceed on the footing that the vendors cannot deny that the sum specified in the receipt clause was received by them, but they do not read the conveyance as containing an admission that all the terms of the contract of sale had been satisfied. The transfer was complete undoubtedly; but the consideration received or receivable on the occasion of a transfer does not as a matter of law necessarily exhaust the whole consideration received or receivable in respect of the sale. In this case the guarantees were on foot from the moment of the making of the contract and did not arise by reason of the conveyance. The receipt clause relates on its face only to what payment was made in respect of the transfer, not to the complete consideration receivable or received under the contract. The last sentence of the deed makes it acidly clear that only the money consideration paid in respect of the sale is included in the sum of £P.3328.530. This admission, therefore, is impotent to put the contract out of consideration.

It is convenient here to consider the effect of the admission contained in the deed. The Supreme Court took the view that the vendors should be treated as having in their hands the difference between the sum of £P.3328.530 and £P.1642.200, and that this difference should be treated as available as a set off against the contingent liabilities of the purchasers under the contract. Their Lordships are, as they have already stated, prepared to assume—they do not decide the point—that the first proposition is correct, but they do not accept the second proposition. An obligation to apply overpaid moneys in a particular way can only arise from an agreement express or implied. Here the terms of the contract are clear that the vendors are not to concern themselves with Haski's claims, and there are no circumstances from which a variation of that bargain can be inferred. The difference between the two sums, on the assumption made, stands nakedly as excess purchase money and, for that matter, money admitted by the purchasers to be paid in consideration of the transfer. Their Lordships would add that the logical consequences of the Supreme Court's view would be that the execution sale was just as much the result of the failure of the vendors to apply money in discharge of Haski's claim as of the failure of the purchasers so to do.

The contract, therefore, is admissible in evidence as showing

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the transaction between the parties. The transfer of the land was obviously not a complete performance of the contract. The breach is obvious, and the only remaining question is as to damages. At the outset their Lordships would observe that the action is in truth only an action for unliquidated damages for breach of contract. The amount payable under the guarantee and the amount paid out of the vendors' assets to Haski is immaterial in assessing the damages. The limit of the guarantee is relevant only in considering whether or not there has been a breach by the purchasers of their obligations. The amount paid to Haski out of the vendors' assets would be properly considered as a separate item in an action for money paid to the use of another, but in assessing damages for the breach of contract neither the upward limit of the guarantee nor the amount of the vendors' assets applied to the purchasers' purposes is relevant. The only question is: What damage—not being too remote—has been suffered by reason of the breach alleged and proved?

The first contention of the purchasers was that the damages should be assessed under art. 112 of the Ottoman Code of Civil Procedure. That article runs as follows:—"The damages to be awarded for failure to carry out the undertaking which amounts to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (sanad) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim." This contention of the purchasers found no favour either with the trial judge or the Supreme Court. Their Lordships agree with the view expressed by the courts below that the contract is in substance a contract to indemnify. That contract might well be performed by satisfaction of Haski otherwise than by payment of money, despite the dissent of the vendors from that method of performance. A contract to indemnify such as is here present which, on breach, gives rise to a claim for unliquidated damages is not, in their Lordships' view, an undertaking which amounts to a payment of money within the meaning of art. 112. Their Lordships therefore find it unnecessary to express an opinion on the general question whether art. 112 applies only when the

claim is a claim for damages arising from non-payment of a sum due as a debt.

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The remaining question is whether the loss resulting from the execution sale is too remote to be taken into account in assessing the damages recoverable. Both the trial judge and the Supreme Court, taking the view that the contract was a contract of indemnity, held that the loss on the sale was a direct result of the failure to perform that contract. Their Lordships are in some doubt whether by the phrase "direct result" the courts below meant to express the view that the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken. But their Lordships, considering the matter from this aspect, have come to the conclusion that the damages claimed are not too remote. The terms of the contract and its implications have to be weighed. Litigation by Haski against the vendors arising out of failure to pay Haski's claim was contemplated by the contract. Specific provisions directed to that litigation and its consequences are contained in cl. 7. The purchasers were to play a definite part in it. Advocates for the vendors were to be selected and paid by the purchasers, not merely to oppose the claim, but also in respect of "action arising thereupon." The vendors' impecuniosity was not a separate and concurrent cause of the land being sold in execution, and the trial judge held, as has been stated, that it was common knowledge that on a forced sale full value was seldom realized. Whether the contract be read as a contract to indemnify the vendors at all stages or as a contract to indemnify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result is, in their Lordships' opinion, the same. In any event, the limit on the amount payable under the guarantee is irrelevant in measuring the damages for breach of it. On the first basis the damages claimed fall within the terms of the contract on its true construction, and on the second they are damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties.

Their Lordships quantify the damages as follows. The value of the land sold was £P.6543. Out of that sum the vendors have been paid, after meeting Haski's claims, the sum of £P.1065,869, and there remains in the execution office to their credit (subject to certain possible claims by Haski) £P.3145.

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The loss they have suffered is therefore £P.5162.631. The vendors' claim was, however, in the statement of claim limited to £P.4997.0 and that sum only can be recovered. Their Lordships would add that it was not contended by the purchasers that the damages recoverable were limited by the penalty clause, and that the question of the interest, if any, carried by a judgment for unliquidated damages was not debated before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that judgment be entered for the vendors for £P.4997 together with interest at such rate from the date of the judgment of the trial judge as is allowed by the law of Palestine in respect of a judgment for unliquidated damages for breach of a contract to indemnify, and that the appellants pay the costs of the proceedings in the Supreme Court. The appellants will pay the costs of the appeal and the cross-appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Teff & Teff.*

[HOUSE OF LORDS.]

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AND
Oct. 28, 29, FREDERICK LEYLAND & COMPANY
31 ;
Nov. 1, 4. LIMITED (J. RUSSELL & COMPANY) RESPONDENTS.

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Feb. 21. *Contract — Construction — Ship repair — Payment for repairs —
Certificate by owners' surveyor—Duties of surveyor.*

A contract for the repair of a vessel entered into in 1941 between the shipowners, the repairers and the Ministry of War Transport, to which the vessel was to be chartered, provided (inter alia) that the shipowners' surveyor should exercise reasonable supervision of the repairs during the progress thereof and also (by cl. 7) :
"The owners shall pay for the repairs upon the ordinary com-

* *Present* : LORD THANKERTON, LORD PORTER, LORD UTHWATT and LORD DU PARCQ.

"mercial basis Payment shall be effected as required by
 "the repairers on the basis of cash against expenditure during the
 "progress of the work and the ascertained balance on the com-
 "pletion of the repairs and every such payment shall be effected
 "promptly by the owners after the issue of a certificate by the
 "owners' surveyor that the work has been satisfactorily carried
 "out and on receipt of a certificate of the amount due issued by
 "the Costs Investigation Branch of the Ministry of War Transport
 "and certifying that same has been checked and found correct
 " The repairers shall keep correct and full entries and
 "accounts of all wages expended and of the cost of all materials
 "and things used in the execution of the repairs and shall permit
 "the accountants of the said Costs Investigation Branch to
 "inspect and examine all such entries and accounts and
 "shall give to such accountants all such information as
 "shall be reasonably required by them to enable them
 "to determine the sums from time to time payable by the owners
 "in respect of the further repairs and to issue the said certificates
 "accordingly. Such last-mentioned certificates shall be accepted
 "by the parties hereto as final and conclusive." The contract
 contained no general arbitration clause.

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The surveyor, contending that his function of certification was not confined to the actual quality of the work done but that he was also entitled to consider whether there had been reasonable economy in time, labour and materials, refused to give a certificate without certain information which the repairers did not furnish. The Costs Investigation Branch certified in terms that the expenditure incurred amounted to a certain sum but did not expressly certify that any sum was due.

Held, (1.) that on the true construction of the contract the surveyor, in relation to certifying that the work had been satisfactorily carried out, was confined to passing the actual quality of the work, without regard to the amount or value of the materials and labour expended thereon; (2.) that the meaning of the words "satisfactorily carried out" was to be determined by the court and not by the surveyor; (3.) that the certificate by the Costs Investigation Branch constituted a certificate under cl. 7, that the sum claimed by the repairers was due; and (4.) that the repairers were entitled to recover that amount without producing a certificate of the surveyor in pursuance of cl. 7.

Held further, that by entering into the contract the repairers agreed that the shipowners' surveyor should discharge the duties both of expert and of quasi-arbitrator and, therefore, could not claim that he must be in the position of an independent arbitrator who had no other duty which involved acting in the interests of one of the parties; accordingly in so acting he was not guilty of collusion or bad faith.

Ranger v. Great Western Ry. Co. (1854) 5 H. L. C. 72 applied, and *Hickman & Co. v. Roberts* [1913] A. C. 229, distinguished.

Decision of the Court of Appeal affirmed.

H. L. (E.) APPEAL from the Court of Appeal (Scott, Luxmoore and Goddard L.JJ.).

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In an action tried by Atkinson J. the respondents (the plaintiffs), who were ship repairers obtained judgment against the appellants (the defendants), who were shipowners, for 21,239*l.* 4*s.* 7*d.* due in respect of repairs done to the appellants' ship, the *I. W. Winck*. The Court of Appeal affirmed the judgment. The appellants appealed to the House of Lords. The facts are fully set out in the opinion of Lord Thankerton.

Pritt K.C., Devlin K.C. and Peyton for the appellants.
Paull K.C. and Arthur Hodgson for the respondents.

THE HOUSE took time for consideration.

Feb. 21, 1947. LORD THANKERTON. My lords, this appeal is from a judgment of the Court of Appeal dated July 22, 1943, which affirmed a judgment of Atkinson J., in favour of the respondents, plaintiffs in the action, for the sum of 21,239*l.* 4*s.* 7*d.*, due from the appellants to the respondents in respect of repairs done by the respondents to the steamship *I. W. Winck*, a vessel owned by the appellants, who are a company registered in Panama. These repairs were carried out under a contract under seal between the parties dated December 31, 1941, and the sum sued for which was adjusted between the parties at the above figure, was the final balance alleged by the respondents to be due to them.

The *I. W. Winck* was a foreign vessel with a cargo of wood pulp, then lying sunk by collision in the Thames, which was bought at an Admiralty auction early in 1940 by two Greek shipowners, Mr. J. D. Chandris and his son, on the advice of a marine surveyor, Dr. E. V. Telfer, for 18,000*l.* The appellant company was then incorporated in Panama for the purpose of acquiring the ownership of the vessel. Dr. Telfer became president, and he and his wife were appointed sole directors. The only capital of the company, equivalent in value to about 400*l.*, was supplied by Messrs. Chandris, who also took power of attorney from the company, which gave them practical control of the company's business. Dr. Telfer acted as the appellant company's surveyor for the purpose of procuring and supervising the repairs necessary to the vessel. He was at first anxious to have the vessel repaired on the Tyne, and, in September, 1940, he obtained an estimate

from the Mercantile Dry Docks Company, of which more will be stated later. But the Ministry of War Transport would not allow the vessel to be repaired anywhere except on the Thames. Thereupon, in June, 1941, the appellants obtained from the respondents, who are described in the summons as carrying on business under the style or firm of J. Russell & Co., an estimate of 60,000*l.* for the necessary repairs, but by alterations and deletions in the specification, Dr. Telfer succeeded in getting this figure reduced to 40,000*l.* "approximate." The appellants desired a firm offer, and were delaying their order for the work, when the Ministry of War Transport, requiring the ship in service again, and to save delay, compulsorily acquired the vessel, and ordered the respondents to repair her under the usual form of Government contract entitled "Emergency Ship Repairs Agreement." The form provided for payment on a cost-plus basis "according to the value of the work done and materials provided as certified by the inspecting officers. The inspecting officers will be required to certify that the work has been properly executed and that the materials and labour provided were economically employed." After some negotiation the Ministry on or about September 22, 1941, agreed to return the vessel to the appellants, on their undertaking to proceed forthwith with the repairs and to enter into a formal contract with the Ministry and the respondents. The terms of the tripartite agreement were thereafter discussed and agreed, and they were embodied in a formal agreement dated December 31, 1941. Under the contract, the Ministry transferred the vessel to the appellants, who agreed to charter her to the Minister when the repairs were completed. The appellants were to repay to the Minister the sum he had expended on the repairs, and the contract for the repairs was deemed to have subsisted from the first between the appellants and the respondents. The appellants gave the respondents a bank guarantee for 45,000*l.* as security for due payment of the cost of the repairs. The material clauses constituting the contractual relationship between the appellants (called the owners) and the respondents (called the repairers) were clauses 6 and 7, which provide as follows: "6. This agreement shall be deemed to constitute the contract between the owners and the repairers for the execution of the whole of the repairs to the said vessel upon and subject to the terms and conditions hereinafter expressed and the repairers

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“ hereby covenant with the Minister and the owners jointly
 “ and each of them severally that the repairs shall proceed
 “ and shall be completed by them without any delay except
 “ such as shall arise from circumstances beyond the control
 “ of the repairers. The repairs shall be proceeded with in
 “ accordance with the aforesaid specification (a copy of which
 “ has been or will be signed by or on behalf of the parties
 “ hereto for identification) and no amendment or alteration
 “ shall be permitted to such specification except as already
 “ agreed between the owners, the repairers and the said
 “ licensing surveyor and except such further alterations as
 “ may from time to time be approved or directed by the said
 “ licensing surveyor. All such repairs shall be completed by
 “ the repairers (subject to any circumstance beyond the control
 “ of the repairers) in such manner as to enable the said vessel
 “ to be granted a permanent certificate of seaworthiness and
 “ to be classed with the British Corporation on a B/S certificate
 “ subject to such qualifications as may be directed by or
 “ agreed with the Minister, and to render the said vessel in
 “ all respects fully efficient for service under charter to the
 “ Minister. During the execution of the repairs the owners
 “ shall have the right to send their superintending surveyor
 “ to inspect the said vessel at all reasonable times and to
 “ examine all the materials intended for the execution of the
 “ repairs and all parts of the vessel so far as then repaired
 “ and generally to exercise reasonable supervision of the repairs
 “ during the progress thereof, any reasonable expense incurred
 “ by the repairers in complying with the wishes of the owners
 “ on such inspections and examinations to be charged to the
 “ owners in accordance with the provisions herein contained.
 “ 7. The owners shall pay for the repairs upon the ordinary
 “ commercial basis, i.e., labour plus twenty-five per centum
 “ thereof for establishment charges plus cost of material plus
 “ ten per centum profit on the total of these three items plus
 “ sub-contracts and cash disbursements (including dock
 “ dues) plus five per centum, all old material except heavy
 “ parts of machinery to become repairer’s property. Payment
 “ shall be effected as required by the repairers on the basis
 “ of cash against expenditure during the progress of the work
 “ and the ascertained balance on the completion of the repairs
 “ and every such payment shall be effected promptly by the
 “ owners after the issue of a certificate by the owners’
 “ surveyor that the work has been satisfactorily carried out

“ and on receipt of a certificate of the amount due issued by
 “ the Costs Investigation Branch of the Ministry of War
 “ Transport and certifying that same has been checked and
 “ found correct (and the Minister agrees to procure that the
 “ said Costs Investigation Branch shall so certify and issue
 “ certificates). The repairers shall keep correct and full
 “ entries and accounts of all wages expended and of the cost
 “ of all materials and things used in the execution of the
 “ repairs and shall permit the accountants of the said Costs
 “ Investigation Branch to inspect and examine all such
 “ entries and accounts and shall produce to them all vouchers
 “ and documents necessary for showing the amount of such
 “ wages materials and things and for vouching the same and
 “ shall give to such accountants all such information facilities
 “ and assistance as shall be reasonably required by them to
 “ enable them fully to understand such entries and accounts
 “ and other particulars and to determine the sums from time
 “ to time payable by the owners in respect of the further
 “ repairs and to issue the said certificates accordingly. Such
 “ last-mentioned certificates shall be accepted by the parties
 “ hereto as final and conclusive and shall not be questioned
 “ except as regards any error appearing on the face thereof
 “ and of which due notice shall forthwith be given to the said
 “ Costs Investigation Branch.” The contract contained no
 general arbitration clause.

It will be convenient to state briefly the facts which gave rise to the present litigation. On February 13, 1942, the respondents wrote to the Costs Investigation Branch, to whom I will refer as the C.I.B., stating that their costs to February 3, 1942, amounted to 28,234*l.* 1*s.* 4*d.*, to account of which they had received 19,000*l.*, leaving a balance of 9,234*l.* 1*s.* 4*d.*, and they asked the C.I.B. to certify this figure. On the same day they wrote to Dr. Telfer asking him to certify that the work had been carried out satisfactorily, and, in his reply dated February 14, 1942, Dr. Telfer asked for a list of work which the respondents wished him to certify and also for “ such
 “ information as to labour, materials, dock and crange charges
 “ as to enable a rapid and accurate appreciation to be made
 “ of the position.” There is no dispute that this information was only required by Dr. Telfer because of the view held by him that his function of certification was not confined to passing the actual quality of the work done, but that he was also entitled to consider the manner in which the work had been

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H. L. (E.) carried out, and, in particular, whether there had been reasonable economy in time, labour and materials. The respondents challenged this view of the construction of the clause of the contract, maintaining that Dr. Telfer's duty of certification was confined to questions of the quality of the work carried out. The appellants agreed with the view of Dr. Telfer, and it is the fact that Dr. Telfer and the appellants maintained that position up to and after the issue of the writ in the present action, Dr. Telfer declining to deal with the question of certification until the information asked for by him was forthcoming. On the other hand, the C.I.B. issued interim certificates under cl. 7 on March 3 and April 2, 1942, and their final certificate on April 27, 1942. The writ by the respondents was issued on May 26, 1942. I will now deal with the various questions raised at the hearing before your lordships, and I will take them as conveniently formulated in the appellants' case, though in a somewhat different order :—

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I. On the true construction of cl. 7 of the contract, is the function of the appellants' surveyor in relation to certifying "that the work has been satisfactorily carried out" confined to passing upon the actual quality of the work done without regard to the amount or value of the materials and labour expended thereon, or does it also cover the manner in which the work is carried out?

The construction maintained by the appellants and Dr. Telfer has been rejected both by the learned judge who tried the case and the Court of Appeal, and I have no difficulty in coming to the same conclusion, substantially on the same grounds, namely that what the appellants claim as coming within the province of Dr. Telfer—apart from the quality of the work—is directly concerned with the amount sought to be charged by the respondents and is necessarily the subject of investigation by the C.I.B. in order to certify the amount due, and that any complaints as to want of economy in time, labour or materials should be made, as suggested by Scott L.J., by the appellants, or Dr. Telfer, as their employee, to the C.I.B., as indeed was done in the present case.

II. Is the question of the scope and meaning of the words "satisfactorily carried out" to be decided by the surveyor, or to be left to the court?

There is no general arbitration clause, and no reference of any dispute as to the proper construction of the contract to

the appellants' surveyor as arbiter, and it clearly is for the court to determine the proper construction of the contract.

III. Does the purported certificate of the C.I.B. relied upon by the respondents—which in terms certifies merely that the expenditure incurred by the respondents, as checked and verified, amounts to 50,128*l.* 9*s.* 8*d.* and does not certify expressly that any sum is due—constitute a certificate within the meaning of cl. 7 of the contract that the sum claimed is due?

The appellants submit that the duty of the C.I.B. under cl. 7 is to certify (*a*) the amount due and (*b*) that the same has been checked and found correct, and that, while the latter duty is expressly certified in the final certificate dated April 27, 1942, the certificate does not certify the amount due, in respect that, while it does certify the total amount due, it does not deduct the amounts paid under previous certificates. I agree with the lower courts in their rejection of this contention as groundless, and, in common with Goddard L.J., I regret that it was ever advanced. The certificate expressly states that it is issued pursuant to and in compliance with cl. 7 of the agreement, and it did certify the total amount due, it being a final certificate, and there could be no question as to the appellants' right to receive credit for payments to account already made.

IV. Are the respondents entitled to recover the amount claimed in the action—and not merely such amount as may be held to be a reasonable price—without producing a certificate of the appellants' surveyor in pursuance of cl. 7 of the contract?

The view of the function of the appellants' surveyor under cl. 7 of the contract which I have already expressed, makes it clear beyond dispute that the respondents have done everything which was necessary for them to do in order to require Dr. Telfer to proceed to consider the granting of a certificate under cl. 7, but that Dr. Telfer declined to proceed with the matter unless he was provided with the information to which on his erroneous view of the contract, he held himself entitled; in this view the appellants concurred, and this position was maintained up to and after the issue of the writ. This means that an illegitimate condition precedent to any consideration of the granting of a certificate was insisted on by Dr. Telfer and by the appellants. It is almost unnecessary to cite authority to establish that such conduct on the appellants'

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part absolved the respondents from the necessity of obtaining such a certificate, and that the respondents are entitled to recover the amount claimed in the action. In *Hotham v. East India Co.* (1), Ashhurst J., in delivering the judgment of the court, said: "It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the company's agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in Rolle's Abridgement 445, and many other books." It will be sufficient to add two short passages from the well-known case of *Roberts v. Bury Improvement Commissioners* (2). Blackburn J. says (3): "It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L)" and Kelly C.B. says in reference to the failure of the defendants and their architects to supply plans and to set out the land necessary to enable the plaintiff to commence the works (4): "The rule of law applies, which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party." If the appellants had taken the contrary view of their surveyor's function under cl. 7, it would have been their duty to appoint another surveyor to discharge that function, and if they had refused to appoint another surveyor, the respondents would clearly have been absolved from the necessity of obtaining the surveyor's certificate; the respondents are equally so absolved when the appellants' wrongful view of their surveyor's function under cl. 7 prevents the appellants from obtaining the certificate. I agree with the view expressed on this point by Goddard L.J.

The questions with which I have already dealt are sufficient to dispose of the case in favour of the respondents, and I must express my regret that the remaining questions were ever raised by the respondents, for I have come to the clear conclu-

(1) (1787) 1 T. R. 638, 645.

(3) Ibid. 326.

(2) (1870) L. R. 5 C. P. 310.

(4) Ibid. 329.

sion that they are ill-founded, that they have led to unfortunate developments during the course of the proceedings and that they have led to grave injustice to Dr. Telfer, largely based on erroneous views in both the lower courts as to Dr. Telfer's duties under the contract, which have caused unwarranted criticism of his conduct. The first of these questions is,

V. On the true construction of cl. 7 of the contract, is the appellants' surveyor constituted a quasi-arbitrator, or he is merely an expert?

There can be no doubt that the owners' surveyor is employed in different capacities under cl. 6 and cl. 7—Under cl. 6 he is the employee of the appellants, employed to carry out the necessary surveillance and inspection on their behalf, and to report to them, advise them and consult with them; there may be other minor duties. In all these matters the decisive opinion is that of the appellants. The position under cl. 7 is different, as the decisive opinion is that of the surveyor himself, and that opinion should be an independent one. For these reasons, I do not think the use of such expressions as "quasi-arbitrator" or "merely an expert" are really helpful. By entering into the contract, the respondents agreed that the appellants' surveyor should discharge both these duties, and therefore they cannot claim that the appellants' surveyor must be in the position of an independent arbitrator, who has no other duty which involves acting in the interests of one of the parties. In *Ranger v. Great Western Ry. Co.* (1), Lord Cranworth L.C., after a reference to *Dimes v. Grand Junction Canal Co.* (2), which related to the disqualification of a judge on the ground of interest, says: "But the question is whether "it governs the present case. I think the principle has no "application here; a judge ought to be, and is supposed to be, "indifferent between the parties. He has, or is supposed to "have, no bias inducing him to lean to the one side rather than "to the other. In ordinary cases it is a just ground of excep- "tion to a judge that he is not indifferent, and the fact that he "is himself a party, or interested as a party, affords the "strongest proof that he cannot be indifferent. But here the "whole tenor of the contract shows it was never intended that "the engineer should be indifferent between the parties." Later, Lord Cranworth adds (3): "If indeed, there "was anything like fraud or unfairness in the case, different

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(1) (1854) 5 H. L. C. 72, 89.

(3) 5 H. L. C. 72, 93.

(2) (1852) 3 H. L. C. 759.

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" considerations might arise ; but the evidence wholly fails
" to establish anything of the sort ; I can discover no trace
" of any desire not to certify fully and fairly the amount due."

I am not aware of any difference on this matter between the law of England and the law of Scotland, and I may quote from the opinion of Lord President Inglis in *Scott v. Carlisle Local Authority* (1) in which he says, " The question is whether Mr. Tait did anything to disqualify himself. He complained that the work was not properly done. But he had two duties to perform—to superintend and control the work, and also to act as arbiter. It is the combination of these duties which makes a reference of this kind so peculiar. But it is impossible to say that because a man faithfully and zealously executes the one function that he thereby debars himself from acting in the other. To say that such statements as these, which were made by the engineer, are sufficient to disqualify him, would be to hold that the two offices were incompatible." Lord Cranworth excepts fraud or unfairness ; as to fraud there could be no doubt, but as to what constitutes unfairness in such a position, I may refer to the well-known case of *Hickman & Co. v. Roberts* (2), with which I must deal in some detail, as the limits of the grounds of decision have been misapprehended, in my opinion, in the present case. Under the contract payment was to be made to Roberts, the contractor, as the work proceeded on certificate of the building-owners' architect at the rate of 80 per cent. of the work actually done in sums of not less than 400*l.*, a further ten per cent. to be paid on the practical completion of the work, and the balance on completion of the contractor's term of maintenance, which was three months after certified completion. It was held in this House, affirming the Court of Appeal, that the owners were precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the final certificate, which was issued after the date of the writ, was conclusive as to the amount of the claim. It is clear from all the judgments that the ground of disqualification was that Mr. Hobden, the owners' architect, had referred to the owners for instructions and had accepted and acted on their instructions in reference to the matter submitted to him as arbitrator, regardless of his own opinion. For instance, in

(1) (1879) 6 R. 616, 617.

(2) [1913] A. C. 229.

one letter written by Hobden to Roberts, he says (1): "Had you not better call and see my clients, because in the face of their instructions to me I cannot issue a certificate whatever my own private opinion in the matter." Lord Loreburn L.C. says (2): "The architect, Mr. Hobden, did, I think, place himself in a position which deprived his certificate of the value which otherwise it would have had. Fletcher Moulton L.J., after referring to what he had done, says: 'He is no longer fit to be a judge, because he had been acting in the interests of one of the parties, and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to.' I agree with that, but it is not in my opinion a case to which the terms 'turpitude' or 'fraud' are apt. I think the real error of Mr. Hobden was that he mistook his position; that he meant to act as a mediator; that he had not the firmness to recognize that his true position was that of an arbitrator, and repel unworthy communications made to him by the defendants. It is undoubted that the defendants, Messrs. Hickman, tried in this respect to lead him astray in their own interests." After reviewing the correspondence, Lord Alverstone says (3): "It is only necessary to consider what happened in two sentences to see that these letters may have had, and probably did have, some effect upon Mr. Hobden's position. We know that with regard to the issue of an interim certificate he did, without justification and against his own opinion, abstain from issuing it from the month of April down to June 17, and we further know that he did not issue his final certificate till he was directed by the solicitors of Messrs. Hickman to do so." Lord Atkinson says (4): "My Lords, I concur, and I base my judgment upon three conclusions at which I have arrived. First, I think it is clearly established upon the evidence that this arbitrator had ceased to be a free agent, that he had forfeited his independence as an arbitrator, and had allowed himself to be under the control or under the influence of the building owners. I think it is not satisfactorily found that he ever recovered his independence, but that on the contrary, the fair presumption from the entirely unexplained delay in giving his final certificate is that he continued to be under the influence of the building owners."

(1) [1913] A.C. 231.

(2) Ibid. 233.

(3) Ibid. 237.

(4) Ibid. 238.

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H. L. (E.) Lord Shaw of Dunfermline says (1): "I find that it is established, conclusively as I think, that he (Mr. Hobden) did not act with sufficient firmness to enable him to decide questions according to his own opinion, those questions affecting the issue of certificates and the interim amounts thereof. Instead of doing so, my Lords, he accepted the instructions or orders of the owners and their solicitors upon that topic." I will now consider under the last two questions, which may be taken together, whether any case of such unfairness on the part of Dr. Telfer has been established in the present case. These two questions are:

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VI. Are the respondents so entitled to recover the amount claimed if they establish "collusion" between the appellants and their surveyor? And is such collusion established?

VII. Was the issue of "collusion" tried by the learned trial judge in such a manner that his findings thereon can be allowed to stand?

The question of "collusion" did not appear in the pleadings until after the appellants, in their points of defence, delivered on July 7, 1942, had pleaded that the obtaining of the certificate by the owners' surveyor was a condition precedent to the respondents' right to receive any payment under the contract. In their points of reply delivered July 15, 1942, no mention was made of collusion, but an amendment of para. 3, pursuant to an order dated July 22 and delivered on July 27, 1942, read as follows: "(d) That the said certificate of Dr. Telfer was improperly withheld by him in the interests of the defendants and/or by their influence and direction. The plaintiffs will rely upon the fact that Dr. Telfer was president of the defendant company as well as acting as their surveyor, and upon his failure and/or refusal in the circumstances referred to in (a), (b) and (c) hereof to issue any certificate or certificates. The plaintiffs cannot until after discovery give further particulars under this sub-paragraph." Sub-para. (a), (b) and (c) do not widen the charge of collusion. The trial began on November 4, 1942, and the evidence was concluded on November 16, the ninth day; the hearing was continued on November 17 and 30, 1942; judgment was delivered by the learned judge on the last-mentioned day. On November 17, 1942, the learned judge gave leave to the present respondents to deliver further particulars under

para. 3 (d) of the points of reply, and a further paragraph was added thereto, as follows: "The plaintiffs will further
 "rely upon a letter dated March 13, 1942, from Dr. E. V. Telfer, the defendants' surveyor to Chandris (England), Ltd., as agents for the defendants, as evidence of bad faith
 "and/or collusion by and between the defendants and their surveyor aforesaid." The learned judge found that there was collusion between Dr. Telfer and Mr. Chandris; he also found that there was bad faith between them. The grounds on which he came to these conclusions appear clearly enough from some of the passages in his judgment. After stating that the case of *Hickman & Co. v. Roberts* (1) was the only authority with which he was going to concern himself in this case, and quoting certain passages from the speeches, the learned judge says (2): "Well, to my mind, in view of what
 "was said in that case, it is simply hopeless to say that in this case there was not collusion. It is quite hopeless to say that Dr. Telfer was not being influenced by his paymasters, the parties to the contract in fact, and their solicitors. He was being influenced and being taken to the solicitors and being advised and taken to counsel, and copies of counsel's opinion were being given to him; and, to my mind, that makes it quite impossible to suggest that he was maintaining any pretence of a position of judicial impartiality." The learned judge's conclusion as to bad faith is based mainly, if not entirely, on the letter of May 13, 1942, from Dr. Telfer to Mr. Chandris, which will be dealt with separately by me.

On the question of the so-called collusion, it is clear to me that the learned judge has not correctly appreciated the true position in law or under the present contract. I have already expressed my view as to the law, and the true ground of decision in *Hickman & Co. v. Roberts* (1), and I will now analyse the position under the contract in the present case. As to the quality of the finished work Dr. Telfer was in the position of an arbitrator. Dr. Telfer, and the appellants, wrongly maintained that his jurisdiction as an arbiter also included questions as to the manner in which the work had been carried out, in particular as to want of economy in time, labour or materials. Apart from Dr. Telfer's position of arbiter as to quality of the finished work, he was the employee

(1) [1913] A. C. 229.

(2) (1942) 74 Ll. L. Rep.
 108, 128.

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of the appellants under cl. 6, and his duties as such would clearly include inspecting and reporting to the appellants any want of economy in time, labour or materials, and taking their instructions in that regard. It is obvious that the existence of any want of economy in these matters is not inconsistent with the quality of the finished work being entirely satisfactory in the opinion of Dr. Telfer. It follows that Dr. Telfer's discharge of his duties, as above suggested, under cl. 6 could not disqualify him as an arbiter under cl. 7, and, equally, could afford no ground for a charge of collusion. This underlines the contrast between the present case and the case of *Hickman & Co. v. Roberts* (1).

In the case of *Scott v. Carlisle Local Authority* (2), to which I have already referred, the contract contained a clause referring disputes to James Tait, C.E., the defenders' engineer; the contractor, Scott, maintained that the clause of reference could not be founded on, as during the progress of the works Mr. Tait had made a report in which he complained in strong terms of the manner in which they were being executed. This contention was rejected, Lord President Inglis delivering the judgment which I have quoted earlier. This case is a fortiori of that case, as the arbitration clause in that case covered all disputes. In a later case of *Halliday v. Duke of Hamilton's Trustees* (3), the arbitration clause, in the widest terms, referred all disputes of any kind to the defenders' engineer. The contract was for the construction of a pier, after the completion of which a question arose as to whether a sum for extra work was due to the contractor, and the engineer wrote letters—in answer to a request by them—giving a detailed opinion to the effect that the greater part of the sum in question was not due to the contractor. It was held that the engineer had not disqualified himself from acting as arbiter, there being nothing in the letters to shew that he would not, as arbiter, regard the question in dispute with an open mind. Lord Justice-Clerk Macdonald says (4): “If, under a clause “of reference, entered into by a contractor and his employers, “it is agreed that the employers' engineer shall be the arbiter “in any question as to work done by or money due to the “contractor, in such a case there cannot be such absolute “abstention from communication between the employers and “the party named as arbiter as in the case of a reference to

(1) [1913] A. C. 229.

(2) 6 R. 616.

(3) (1903) 5 F. 800.

(4) Ibid. 808.

“ an independent arbiter. In a case where the engineer is named as arbiter, and the contractor comes forward with a claim for a sum of money as being due to him, it is the most natural thing possible for the employers to inquire of their engineer what view he takes of the work done by the contractor and the account rendered by him, because if the engineers are satisfied that the claim is proper, there will not be any need for arbitration, and an engineer who expresses a general opinion, not ultroneously but in answer to his employers, cannot I think be excluded on that account from acting as arbiter. If the employers proceed to arbitration, then the engineer, as arbiter, must receive all competent evidence which the contractor thinks proper to bring before him and give an honest opinion upon it. The fact that he has expressed an opinion as an engineer before receiving the evidence does not prevent him from afterwards applying his mind judicially to the questions at issue in the light of the evidence adduced.” Lord Trayner says (1) : “ I should certainly be disposed to exclude from the office of arbiter anyone who had put himself in the position of having already decided the question in dispute before the reference had been finally made, but in this case I think there is no reasonable ground whatever for excluding the Messrs. Stevenson. I do not think that anything in their letters indicates a want of open mind on their part. They did not enter into the matter ultroneously; they were applied to by their employers for certain information regarding the pursuer’s claim, which they gave. In so far as the letters before us are concerned, I can find nothing to suggest that they are not prepared to deal with any question brought before them with a perfectly open mind—nothing to indicate that if they came to think that any opinion which they had expressed was wrong they would not decide accordingly.” I may also refer to the decision of the Court of Appeal in a somewhat similar case, *Cross v. Leeds Corporation* (2) in which Mathew L.J., said : “ The engineer or architect under a contract of this sort is placed in two positions, and he is allowed to assume those two positions with the full knowledge of both contracting parties; and in the one position he is bound to do his best for his employer, and to look sharply after the builder whilst the work is going

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(1) 5 F. 810.

(2) (1902) Hudson on Building
Contracts, 4th ed., vol. II., 339,
343.

H. L. (E.) "on, and it is his duty in that capacity to form an opinion
 1947 "as to what his employer is entitled to while the works are
 PANAMENA "being executed. The contract, it seems to me, contemplates
 EUROPEA "that differences are likely to arise between the builder and
 NAVIGACION "the architect or engineer, and that the time might come
 (COMPANIA "when the engineer should deal with them in a different
 LIMITADA) "capacity, and then he has to do his best as an honourable
 v. "man to determine, judicially and finally, questions between
 FREDERICK "the parties." I regard that as a correct statement of the
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My Lords, the facts of the present case appear to me to afford even less ground for suggesting disqualification of Dr. Telfer than the facts in these two cases. In the present case there is a complete absence of any evidence which could suggest that, if Dr. Telfer were satisfied that his jurisdiction as arbiter was confined to the quality of the completed work, he would not apply his mind judicially to the question. The question of the proper construction of cl. 7 of the contract as to the scope of his certificate is antecedent to, and quite apart from, the judicial performance of his duty as arbiter, and, while his attitude, and that of his employers, on the question of construction, may lead to the absolution of the respondents from the necessity of a certificate, it does not justify the implication that, when the construction is settled contrary to his view, he will not judicially perform his duty as arbiter. On the matter of construction, I am of opinion that he was entitled to consult with his employers, and with their solicitors and counsel. I find myself unable to agree with the learned judge that Dr. Telfer's opinion on construction was affected by his employers, their solicitors, or their counsel. In fact Dr. Telfer's opinion was formed by February 14, 1942, before there is any suggestion of such consultation, and the evidence at least suggests that he is tenacious of his own views. His employers, the solicitors and counsel all concurred in his view. The question was one of construction only, and I am unable to understand why the learned judge went out of his way to say (1): "One wonders what facts were put before counsel." Accordingly, subject to the matter of the letter of May 13, 1942, I am clearly of opinion that there is no evidence of "collusion" between Dr. Telfer and Mr. Chandris, or, as I prefer to put it, nothing which would disqualify Dr. Telfer from acting as arbiter under cl. 7 of the contract.

There can be no doubt as to the view of the learned judge

of the letter of May 13, 1942. He says it is wholly untrue from beginning to end, that the attitude proved by that letter was thoroughly dishonest, and he was sure that Mr. Chandris must have known it. It was quite apparent that, as the trial proceeded, despite the protests of counsel, the learned judge's mind was becoming filled with the idea of bad faith, and his misapprehension as to the limits of the decision in *Hickman & Co. v. Roberts* (1) on the general question of collusion and its application to the facts of the present case afforded a background for such a suggestion of bad faith. This idea of bad faith culminated in the amendment which—if not indeed suggested by the learned judge himself, as asserted by the respondents in their case before this House—was allowed by him on November 17, 1942, after the conclusion of the evidence. I agree with the learned judges of the Court of Appeal that the amendment should not have been allowed, as Dr. Telfer and Mr. Chandris were entitled to have full opportunity in evidence and argument to meet it. But I cannot agree with the learned judges that you are still entitled to use the letter against Dr. Telfer, because, as Scott L.J. puts it (2), Dr. Telfer "had in the box really known self-consciously that he was being 'so charged.'" That appears to me to be a denial of the full opportunity in evidence and argument, to which the learned Lord Justice had just held him to be entitled. Goddard L.J. seemed to think that the letter might still afford evidence of innocent collusion between Dr. Telfer and Mr. Chandris, but, in my opinion, the learned judges of the Court of Appeal were in similar error as to the limits of the decision in *Hickman & Co. v. Roberts* (1), and its applicability to the facts of the present case, and my criticisms of the judgment of the trial judge in this respect are equally appropriate to the judgments of the judges of the Court of Appeal. There is no dispute that this letter was written by Dr. Telfer to Mr. Chandris at the request of his employers and their solicitors for his opinion as to the proper amount to be paid in respect of the repairs, on the footing that his and their construction of the contract was correct, and I have no doubt that it had in view possible negotiations for a settlement, though at that time the parties were at arms' length, as is shewn by Messrs. Constant's letter to the respondents' solicitors dated May 6, 1942. In my opinion, Dr. Telfer

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(1) [1913] A. C. 229.

(2) (1943) 76 Ll. L. Rep. 113,

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was entitled, when requested by his employers, to afford them such information; the case of *Halliday* (1), already referred to, appears to cover this exact point, and the fact that he gave incorrect information to his employers,—if he did indeed give incorrect information, for I am far from satisfied that there is any evidence to support, for instance, the figure of about 9,000*l.* to 10,000*l.* of extra work, on which the learned judge lays such stress,—does not, by itself, involve innocent collusion. In short, this letter falls to be disregarded so far as it can give rise to any suggestion of fraud or bad faith, and, apart from that, it affords no ground for disqualification of Dr. Telfer as arbiter under cl. 7. It follows from the above that the respondents have failed in their allegations of “collusion” set out in the first part of head (d) of para. 3 of their amended points of reply. While it is true that the respondents protest that their case never was based on bad faith or fraud, they must take their share of responsibility for the course of the trial, which resulted in their tendering and obtaining the amendment based on bad faith. I regret that the charges of innocent collusion were ever made, but I regret still more the conduct of the trial, which culminated in that amendment, and which, in my opinion, did not give Dr. Telfer a fair chance as a witness, for it seems clear that the learned judge’s distrust of Dr. Telfer’s evidence is based mainly, if not wholly, on the inferences of bad faith or fraud, which should not have been introduced, in the absence of pleadings to support them. Accordingly, I am not prepared, under these circumstances, to accept the learned judge’s view of the value of Dr. Telfer’s evidence.

On the whole matter, I am of opinion that the Court of Appeal were right in holding that the respondents were absolved from the necessity of obtaining Dr. Telfer’s certificate under cl. 7 for the reasons stated in the earlier part of this opinion, and that the order of the Court of Appeal dated July 22, 1943, should be affirmed and the appeal should be dismissed. In view of the respondents’ failure on the issue of innocent collusion, and the unfair treatment to which Dr. Telfer has been subjected in the conduct of the trial, I propose that the appellants should pay the respondents’ costs of this appeal, but subject to a deduction of 250*l.* from the taxed amount.

My Lords, my noble and learned friend Lord Uthwatt

(1) 5 F. 800.

desires me to say that he concurs in the opinion which I have just read. H. L. (E.)

LORD PORTER : My Lords, I concur.

LORD DU PARCQ : My Lords, I also concur.

Appeal dismissed.

Solicitors for appellant : *Botterell & Roche.*

Solicitors for respondents : *Ince, Roscoe, Wilson & Glover.*

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WILLIAMS' TRUSTEES APPELLANTS ;

AND

INLAND REVENUE COMMISSIONERS RESPONDENTS.

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Jan. 28, 30 ;
Mar. 21.

Charity — Trust — Revenue — Income tax — Exemption — Institute for Welsh people in London—Charitable Uses Act, 1601 (43 Eliz., c. 4)—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 37, sub-s. 1 (a) ; sch. A.

Every object of public general utility is not necessarily a charity, for in order to be charitable a trust must be within the spirit and intendment of the statute 43 Eliz., c. 4. Accordingly, no trust can be charitable unless it is beneficial to the community in a way which the law regards as charitable.

A trust was established with the objects of promoting Welsh interests in London by social intercourse ; discussing all questions affecting Welsh interests ; fostering the study of the Welsh language by lectures on Welsh history, literature, music and art ; maintaining a library of literature in the Welsh language or relating to Wales. The trustees were empowered (inter alia) to maintain an institute and meeting place for the benefit of Welsh people in London with a view to creating a centre to promote " the moral, " social, spiritual and educational welfare of Welsh people."

Held, that the trust was not exempt from income tax under s. 37 sub-s. 1, of the Income Tax Act, 1918, since the ground on which a charitable character was sought to be attributed to it was not that it was beneficial in a way which the law regards as charitable.

Decision of the Court of Appeal (173 L. T. 221) affirmed.

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD NORMAND.

H. L. (E.) APPEAL from the Court of Appeal (Scott, Lawrence and Morton L.JJ.).

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The facts are fully stated in the opinion of Lord Simonds. *King K.C.* and *Bucher* for the appellants.

Sir David Maxwell Fyfe K.C., *J. H. Stamp* and *R. P. Hills* for the respondents.

THE HOUSE took time for consideration.

Mar. 21. VISCOUNT SIMON. My Lords, I have had the great advantage of reading in print and of studying the exhaustive opinion prepared in this case by my noble and learned friend, Lord Simonds. I agree with it, and need say no more except that I move that the appeal be dismissed, with costs.

LORD WRIGHT. My Lords, I also have had the advantage of studying the opinion about to be delivered by my noble and learned friend Lord Simonds. I agree with it, and have nothing to add.

LORD SIMONDS. My Lords, my noble and learned friend, Lord Porter, has asked me to say that he concurs in the opinion which I am about to deliver.

My Lords, the question raised in this appeal is whether under a trust deed dated October 12, 1937, and made between Howell J. Williams, Ltd. as trustees of the one part and Sir Howell Jones Williams, therein called the settlor, of the other part certain properties were vested in the trustees for charitable purposes within the meaning of s. 37 (1) (a) of the Income Tax Act, 1918, and whether the rents of those properties were in the years 1940-41 and 1941-42 applied by them to charitable purposes only. Section 37, sub-s. 1 of the Income Tax Act, 1918, is as follows: "Exemption shall be granted—(a) from
"tax under sch. A in respect of the rents and profits of any
"lands, tenements, hereditaments, or heritages belonging to
"any hospital, public school or almshouse, or vested in trustees
"for charitable purposes, so far as the same are applied to
"charitable purposes only . . ."

I will now state the relevant provisions of the trust deed. It begins by reciting that it is supplemental to a transfer of January 16, 1930, whereby certain freehold property specified in the schedule (together with other property) was transferred to

the trustees. This property consisted of certain premises in the Gray's Inn Road in the parish of St. Pancras and No. 11 Mecklenburgh Square and Nos. 29, 30 and 31 Doughty Street in the same parish. It further recites that the property had been purchased by the trustees out of moneys provided by the settlor and the Young Wales Association (London), Ltd. (hereinafter called "the association") had been incorporated on March 21, 1925, with (inter alia) the following objects, namely: (i) to promote Welsh interests in London and to provide means of social intercourse between persons of Welsh nationality, birth, domicile, education or sympathies; (ii.) to consider and discuss all questions affecting Welsh interests; (iii.) to foster the study of the Welsh language and to procure the delivery of lectures on subjects connected with Welsh history, literature, music and art; (iv.) to form and maintain a library of periodical, historical and other literature in the Welsh language or relating to Wales, and finally, that the property had for some time past been and was then occupied, used and enjoyed by the association with the consent of the settlor for the purposes of the association. I come to the operative part of the deed. Clause 1 contains an important definition: "The expression 'Welsh people' shall mean and include persons of Welsh nationality by birth or descent or born or educated or at any time domiciled in the principality of Wales or the county of Monmouth." Clauses 2 and 3 I can pass over. Clauses 4 and 5 cannot fairly be summarized and I state them in extenso. "4. The trustees shall hold the settled properties and the endowment fund for the purpose of establishing and maintaining an institute and meeting place in London to be known as 'The London Welsh Association' (hereinafter called 'the institute') for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral social spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history literature music and art. 5. Without prejudice to the generality of the foregoing provisions the trustees may use or permit such part of the settled properties as is required to be used as the institute for all or any of the following purposes: (A) For providing a meeting place for Welsh people in London and their friends where they can obtain facilities for social intercourse study reading rest recreation and refreshment. (B) For meetings concerts lectures and

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" other forms of instruction discussion or entertainment
 " especially in relation to subjects connected with the Welsh
 " language and Welsh history literature music and art. (c) For
 " any educational purposes connected with the Welsh language
 " or Welsh subjects or likely to be of value or interest to Welsh
 " people. (d) For establishing and maintaining a library of
 " periodical historical and other literature in the Welsh
 " language or relating to Wales or which is likely to be of use
 " to Welsh people. (E) As a hostel for the accommodation of
 " Welsh people in London. (F) For any of the purposes of the
 " association or of any similar association which may be
 " formed for the benefit of Welsh people in London and which
 " purposes may be within the general scope of the trusts
 " declared in cl. 4 hereof. (G) Generally for such other purposes
 " being charitable and for the benefit of Welsh people as the
 " trustees may from time to time think fit Provided always
 " that the trustees shall not permit any alcoholic liquor to be
 " sold or consumed on any part of the settled properties for the
 " time being occupied or used for the purposes of the institute."

Clause 9 will be found to be important and I set out the
 substantive part of it: "The trustees shall apply the
 " income arising from the endowment fund and any rents and
 " profits arising from the settled properties and any other
 " profits income or contributions which may be received by
 " the trustees in carrying on the institute and otherwise for
 " the maintenance repair and insurance of the settled properties
 " and in payment of the rates and other outgoings and towards
 " the cost of maintaining equipping and using the settled
 " properties for the purposes of the institute and generally for
 " carrying into effect all or any of the trusts of this deed."

Clause 10 provided that the institute should not be used for
 meetings of any political party or for the purposes of any such
 party and that no part of the property, capital or income for
 the time being subject to the trusts thereof should at any time
 be used or applied for any such purposes or for any other
 purposes not being charitable, with a proviso that that
 prohibition should not prevent any application of money or
 property for purposes necessarily incidental to carrying out
 the charitable trusts of the deed. Clause 13 authorized the
 trustees to delegate their power to carry on the institute by
 appointing managers and cl. 14 to exercise that power by
 appointing the association to act as managers of the institute.
 I do not think it necessary to refer to any other provisions of

the deed. On the day following its execution, Howell J. Williams, Ltd., resigned the trusteeship of the deed and in their place seven individuals (including the settlor) were appointed trustees. The survivors of them are the present appellants.

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The relevant facts as found by the Commissioners for the Special Purposes of the Income Tax Acts are these. I take them from the case stated, which will at the same time conveniently show the nature of the claim which is the subject of appeal to this House. Paragraph 4 of the case states that the trust property had always been maintained as two blocks, that the first block (thereinafter referred to as "the institute block") consisted of property in Gray's Inn Road and Mecklenburgh Square which was adapted for use as an institute in accordance with the trusts of the deed, that the second block consisting of 29, 30 and 31 Doughty Street was let out to tenants, that the first block only—and not as incorrectly indicated in the recitals to the deed the whole of the trust property—was until May 1941, occupied by the Young Wales Association (London), Ltd., which later changed its name to London Welsh Association, Ltd., and was thereafter referred to as "the association." In the next paragraph of the case the claim is stated. I think it worth while to set it out: "The trustees did not on this claim contend that this association was established for charitable purposes only. The claim before us was that not the association but the trustees were so established: that in applying the rents of 29, 30 and 31 Doughty Street, to the purposes of the before-mentioned association (which they claimed was an application of income of the trust under cl. 9 of the trust deed) they had applied the same to charitable purposes only; and that, consequently, they were entitled to exemption from income tax, sch. A, in respect of the rents of the said properties." From para. 7 of the case it appears that the trustees in exercise of their powers under the deed allowed the association to occupy the institute block and to act as managers of the institute, and that the association so acted until May, 1941, and that before that date they made two donations to the association for the purposes of the institute, but that after that date the association had been unable to continue in occupation of the premises, which had been let to the Welsh Services Club, and similarly after that date no further donations had been made.

In para. 11 of the case there is a summary of the evidence given before the commissioners by a Mr. V. J. Lewis, one of

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the trustees of the deed and at one time secretary of the association. Since the question raised in this appeal appears in one aspect to turn on findings of fact, I cannot omit a reference to this evidence. It appears that Mr. Lewis and two of his co-trustees met and considered what should be done with the funds which they held under the deed and they decided to make two donations to the institute. They considered that they were carrying out the purposes of the deed, because it was necessary that the institute should be maintained. The association were running the headquarters premises at a loss, although making a profit on their other activities, and he and his co-trustees knew that any donation which they made would be paid into the headquarters account from which the activities of the institute were financed. This was one of two accounts, the other being the general account. On the headquarters account there was a debit balance. On the general account there was a credit balance: into this account the subscriptions of members of the association were paid and also donations from another distinct trust, and out of it was paid printing, postage and secretarial expenses, corporation duty, etc. The association did not keep separate accounts as to the expenditure of the donations. The objects (said Mr. Lewis) to which the donations were intended to be devoted were numbers 1, 4, 5, part of 7 and 8 and 11 of the activities of the association as set out on p. 6 of its booklet which was annexed to the case. These activities are there described as follows: "1. Public lectures and debates, a music club, and literary and educational classes . . . 4. The maintenance of headquarters premises at 11 Mecklenburgh Square, W.C.1, comprising lounge and writing room, library (where current Welsh and English periodicals and newspapers may be found), billiard room, tea and games rooms, etc., available for the use of headquarters members of the association, and of all donors and subscribers. The headquarters premises and in particular the London Welsh Hall are increasingly becoming the meeting place of the committees and functions of the various London Welsh societies and other organizations. 5. Badminton and table tennis clubs are maintained in connexion with the headquarters premises . . . 7. Dances, whist and bridge drives, and annually a dinner and a garden party. 8. A weekly social and dance is held for headquarters members in the London Welsh Hall on Saturday evenings. The charge made for admission is only 6d. (ordinary members, and visitors on

“ the introduction of a member, may obtain admission at 2s.) :
 “ a dance band is provided, and the popularity of these weekly
 “ functions among the younger members of the London Welsh
 “ community is undoubted. . . . II. The headquarters office
 “ of the association serves in many ways as a central infor-
 “ mation bureau for London Welsh people and visitors to the
 “ metropolis.” Mr. Lewis said that in making these donations
 the trustees regarded themselves as contributing to dances,
 whist and bridge drives held at the institute and as part of the
 activities taking place there and not to any such activities
 held elsewhere. A prominent part of the activities of the
 institute consisted of lectures, debates, music club and literary
 and educational classes. Classes were held in the Welsh
 language, history, and literature. The trustees did not con-
 tribute towards the theatre guild referred to in No. 2 of the
 list of the activities. I must assume that the commissioners
 accepted as facts the statements which they set out without
 comment in this case.

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The commissioners then state (as should always be done with
 clearness and particularity) the rival contentions of the trustees
 and the Crown. I have referred earlier in this opinion to the
 claim made by the trustees. Of the Crown it is only said that
 the contention of the trustees was resisted on its behalf. The
 decision of the commissioners was as follows :—

“ Under the terms of the trust deed the purposes of the
 “ institute, to which the rents of the properties in question
 “ held by the trustees have been applied, are wide and inclusive.
 “ While certain of its features conform to the idea of a charity,
 “ we have come to the conclusion that these features are not
 “ so dominating, nor is the general character of the institute
 “ such, as effectively to distinguish it from an ordinary social
 “ club. We are unable to say that it is established for
 “ charitable purposes only, and the application accordingly
 “ fails.” I have thought it necessary to state the facts at this
 length because it has been a matter of some controversy what
 the commissioners really decided. The issues being two-fold
 (a) whether the trust property was vested in the trustees for
 charitable purposes and (b) whether the rents were applied for
 charitable purposes only, it is at least arguable that the
 commissioners, notwithstanding that the facts stated in the
 case related mainly to the second issue, yet decided only the
 first issue. It is not clear what view was taken upon this point
 by Macnaghten J. before whom came the appeal from the

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commissioners. He found it sufficient to say that he saw no ground for questioning their conclusion, adding that, if their decision was open to criticism at all, it was that it might have been expressed in even stronger terms. When the matter came before the Court of Appeal the confusion was made apparent and there was some difference of opinion between the members of that court, Scott L.J. thinking it possible to read into the decision of the commissioners a plain finding of fact that the income in question was not applied to charitable purposes only, while Morton L.J. (if I read his judgment correctly) was prepared to assume that there was no finding of fact fatal to the appellants' case. In these circumstances, while I cannot entertain any doubt that upon the facts stated in the case it was not open to the commissioners to come to any other conclusion on the second issue than that the rents in question were not applied for charitable purposes only, I think it right also to examine the question whether, irrespective of the application of the rents in any year, the trust property itself is vested in the appellants for charitable purposes. That this expression means "for charitable purposes only" is conceded by the appellants.

My Lords, the claim of the appellants that the property is vested in them for charitable purposes is based on these contentions, (a) that "the dominant purpose of the trust is "the fostering of Welsh culture which is a purpose beneficial to the community composed of the people of the United Kingdom," (b) that "the purpose aforesaid is beneficial to the community composed of the people of the Principality of Wales and the county of Monmouth which is an integral part of the United Kingdom and in itself constitutes a political body settled in a particular territorial area" and (c) "because the maintenance of the institute (the expressed method of effectuating the purpose aforesaid) is itself a purpose beneficial to a section of the British community which is determined by reference to impersonal qualifications (namely persons with Welsh connexions who are resident in or near or visiting London); and is not a selection of private individuals chosen on account of personal qualifications." I have taken this statement of the appellants' contentions from the formal reasons in their written case, because in them so clearly appears the fallacious argument upon which in this and other cases, which it has been my fortune to hear, an attempt has been made to establish the charitable character of a trust.

My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers, unless it is within the spirit and intendment of the preamble to the statute of Elizabeth (43 Eliz. c. 4), which is expressly preserved by s. 13, sub-s. 3 of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in *Income Tax Commissioners v. Pemsel* (1) must always be read subject to the qualification appearing in the judgment of Lindley L.J. in *In re Macduff* (2): "Now Sir Samuel Romilly did not mean, "and I am certain Lord Macnaghten did not mean, to say "that every object of public general utility must necessarily "be a charity. Some may be, and some may not be." This observation has been expanded by Lord Cave L.C. in this House in these words: "Lord Macnaghten did not mean that "all trusts for purposes beneficial to the community are "charitable, but that there were certain beneficial trusts which "fell within that category; and accordingly to argue that "because a trust is for a purpose beneficial to the community "it is therefore a charitable trust is to turn round his sentence "and to give it a different meaning. So here it is not enough "to say that the trust in question is for public purposes "beneficial to the community or for the public welfare; you "must also show it to be a charitable trust. See *Attorney-General v. National Provincial & Union Bank of England* (3)." But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail.

My Lords, the cases in which the question of charity has come before the courts are legion and no one who is versed in them will pretend that all the decisions even of the highest authority are easy to reconcile, but I will venture to refer to one or two of them to make good the importance of my two general propositions. In *Houston v. Burns* (4) the question

(1) [1891] A. C. 531, 583.

(2) [1896] 2 Ch. 451, 466.

(3) [1924] A. C. 262, 265.

(4) [1918] A. C. 337.

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was as to the validity of a gift "for such public, benevolent, or charitable purposes in connexion with the parish of Lesmahagow or the neighbourhood" as might be thought proper. This was a Scotch case but upon the point now under consideration there is no difference between English and Scotch law. It was argued that the limitation of the purpose to a particular locality was sufficient to validate the gift, that is to say, though purposes beneficial to the community might fail, yet purposes beneficial to a localized section of the community were charitable. That argument was rejected by this House. If the purposes are not charitable per se, the localization of them will not make them charitable. It is noticeable that Lord Finlay L.C. expressly overrules a decision or dictum of Lord Romilly (1) to the contrary effect in *Dolan v. Macdermot* (2). Next I will refer to a case in the Privy Council which is the more valuable because Lord Macnaghten himself delivered the judgment of the Board. In that case the question was of the validity of a residuary gift "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese." What could have been easier than to say that such a trust was beneficial to the community, and moreover to a section of the community sufficiently defined by a reference to the diocese, and was therefore charitable? Yet the only argument was that the benefit to the community was of a character which fell within the preamble to the Statute of Elizabeth, i.e., for religious purposes, and therefore was charitable. And it is to be observed that this contention was rejected on the narrow ground that the terms of the bequest were not identical with religious purposes. "The language of the bequest" said Lord Macnaghten "would (to quote Lord Langdale's words) be open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution": *Dunne v. Byrne* (3). One more decision out of many to the same effect may be cited. In *Farley v. Westminster Bank* (4) a testatrix had bequeathed the residue of her estate in equal shares to the respective vicars and churchwardens of two named churches "for parish work." Could it be doubted that the purpose of the gift was beneficial to the community? It could fairly be described in the very

(1) [1918] A. C. 341.

(2) (1867) L. R. 5 Eq. 60.

(3) [1912] A. C. 407, 411.

(4) [1939] A. C. 430.

words in which the appellants here assert the charitable nature of their trust. Yet the gift failed. It was, in the words of Lord Russell of Killowen (1), "for the assistance and further-
"ance of those various activities connected with the parish
"church which are to be found in . . . every parish." It would be unduly cynical to say that that is not a purpose beneficial to the community. Yet it failed. And it failed because it did not fall within the spirit and intendment of the preamble to the Statute of Elizabeth.

My Lords, I must mention another aspect of this case, which was discussed in the Court of Appeal and in the argument at your Lordships' bar. It is not expressly stated in the preamble to the statute, but it was established in the Court of Chancery, and, so far as I am aware, the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. The rule is thus stated by Lord Wrenbury in *Verge v. Somerville* (2): "To
"ascertain whether a gift constitutes a valid charitable trust
"so as to escape being void on the ground of perpetuity,
"a first inquiry must be whether it is public—whether it is
"for the benefit of the community or of an appreciably
"important class of the community. The inhabitants of a
"parish or town, or any particular class of such inhabitants,
"may for instance, be the objects of such a gift, but private
"individuals, or a fluctuating body of private individuals,
"cannot." It is, I think, obvious that this rule, necessary as it is, must often be difficult of application and so the courts have found. Fortunately perhaps, though Lord Wrenbury put it first, the question does not arise at all, if the purpose of the gift whether for the benefit of a class of inhabitants or of a fluctuating body of private individuals is not itself charitable. I may however refer to a recent case in this House which in some aspects resembles the present case. In *Keren Kayemeth le Jisroel, Ltd. v. Inland Revenue Commissioners* (3) a company had been formed which had as its main object (to put it shortly) the purchase of land in Palestine, Syria or other parts of Turkey in Asia and the peninsula of Sinai for the purpose of settling Jews on such lands. In its memorandum it took

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(1) [1939] A. C. 437.

(3) [1932] A. C. 650.

(2) [1924] A. C. 496, 499.

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numerous other powers which were to be exercised only in such a way as should in the opinion of the company be conducive to the attainment of the primary object. No part of the income of the company was distributable among its members. It was urged that the company was established for charitable purposes for numerous reasons, with only one of which I will trouble your Lordships, namely, that it was established for the benefit of the community or of a section of the community, namely, Jews, whether the association was for the benefit of Jews all over the world or of the Jews repatriated in the Promised Land. Lord Tomlin (1) dealing with the argument that I have just mentioned upon the footing that, if benefit to "a community" could be established the purpose might be charitable, proceeded to examine the problem in that aspect and sought to identify the community. He failed to do so, finding it neither in the community of all Jews throughout the world nor in that of the Jews in the region prescribed for settlement. It is perhaps unnecessary to pursue the matter. Each case must be judged on its own facts and the dividing line is not easily drawn. But the difficulty of finding the community in the present case, when the definition of "Welsh people" in the first deed is remembered, would not I think be less than that of finding the community of Jews in *Keren's* case (2).

At an early stage in this opinion I said that cases on the law of charity are not easy to reconcile. I would not be taken as suggesting that there is any doubt about the present case. I agree with the learned judges of the Court of Appeal that, upon the construction which they have adopted of the trust deed—and it is the only possible construction—the property is not vested in the appellants for charitable purposes only. It is clear, as I have already said, that they have not applied the income for charitable purposes only, and I do not doubt that they have applied them strictly in accordance with their trust. "Matters," said Lord Russell of Killowen (then Russell L.J.) "have been stretched in favour of charities almost to bursting point," see *In re Grove-Grady* (3). That point would be reached if your Lordships held that this trust deed has a purpose which falls within the spirit and intendment of the preamble. It clearly does not, and, if it does not, let the community be what you will, let the purpose be as beneficial as you like; here is no charity.

(1) [1932] A. C. 659.

(2) *Ibid.* 650.

(3) [1929] 1 Ch. 557, 582.

My Lords, it would not be right for me in a case which raises in such a general form the broad question of charitable trusts to ignore a line of authorities relied on by the appellants. More accurately, I think, there are two lines of authorities which are apt to converge and cross each other. There is, first, the class of case of which *In re Smith* (1) is typical. In that case the testator gave his residuary estate "unto my country England" "to and for—own use and benefit absolutely" (sic). This was held to be a good charitable trust. Here no particular purpose or benefit was defined. Secondly, there is the class of case of which *Goodman v. Saltash Corporation* (2) may be regarded as the prototype. There Lord Selborne L.C. used the words cited so often in the reports (3). "A gift subject to a condition" "or trust for the benefit of the inhabitants of a parish or town," "or of any particular class of such inhabitants, is (as I understand the law) a charitable trust." In the one class of case there is no particularity of benefit and the widest range of beneficiary, in the other the beneficiaries are localized and the nature of the benefit defined. How are these cases to be reconciled with the decisions of this House to which I earlier referred? In Tudor on Charities, 5th ed., p. 45, it is said: "It is hard to avoid the conclusion that the foregoing cases, which establish that gifts for the benefit of particular districts are charitable, are anomalous. They cannot be related to the statute of Elizabeth, and they logically involve the proposition that purposes which are not charitable in the world at large are charitable if their operation is confined to a specified locality, for public or benevolent purposes are not charitable, while there is nothing to prevent the trustees of a fund given for the benefit of a parish from spending it upon public or benevolent purposes, and yet the gift of such a fund is charitable. Nevertheless, a gift for public purposes in a particular parish is not charitable." Your Lordships may think that this sounds like a cry of despair, and, in truth, there is some ground for it. But I would suggest that it is possible to justify as charitable a gift to "my country England" upon the ground that, where no purpose is defined, a charitable purpose is implicit in the context; it is at least not excluded by the express prescription of "public" purposes. Where the gift is localized but the nature of the benefit is defined, no reconciliation is possible except on the

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(1) [1932] 1 Ch. 153.

(3) Ibid. 642.

(2) (1882) 7 App. Cas. 633.

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assumption that the particular purpose was in each case regarded as falling within the spirit and intendment of the preamble to the statute of Elizabeth, though I find it difficult to ascribe this quality to the benefit taken by the freemen of Saltash. If this affords no solution of the problem, I can only invite your Lordships to maintain the principles which have consistently been asserted in this House over the last fifty years in this difficult and intricate branch of the law. I would dismiss this appeal.

LORD NORMAND. My Lords, I agree with my noble and learned friend Lord Simonds. Discordant decisions have resulted from the occasional failure to keep in mind the two propositions which my Lord has now re-asserted and from the tacit assumption that all trusts beneficial to the public at large or to some section of it are entitled by a benevolent construction to the special privileges of charitable trusts. Yet the line between charitable and non-charitable trusts is sometimes difficult to draw, even when correct principles are applied, particularly where the claim is made that the trust is charitable because its purpose is the furtherance of the moral improvement of the community. The decision in *Inland Revenue Commissioners v. Falkirk Temperance Café Trust* (1), a case which has some resemblance to the present, must, I think, rest on the ground that the predominant purpose of the trust was the moral improvement by means of temperance of the inhabitants of Falkirk and that the cafés and temperance hotel provided by the trust were so subordinated to the predominant purpose that it was possible to distinguish them from an ordinary commercial venture in catering and hotel-keeping. In the present case the decision of the commissioners was that, while certain features of the institute conformed to the idea of charity, they were not so dominating nor was the general character of the institute such as effectively to distinguish it from an ordinary social club. In my opinion this conclusion is amply supported by the facts and is well founded in law.

Appeal dismissed.

Solicitors for appellants : *T. D. Jones & Co.* !

Solicitor for respondents : *Solicitor of Inland Revenue.*

(1) 1927 S. C. 261.

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Feb. 7.

Scotland — Succession — Testamentary writings — Bequest of residue — Sisters and issue of predeceasing sisters—Sister dead at date of execution.

A testatrix died in 1944, having by her trust, disposition and settlement, made in 1942, directed her trustees to divide the residue of her estate "equally between my sisters : And "it is hereby declared that in the event of any of my said sisters " who may have predeceased me, leaving lawful issue, "such issue shall be entitled to the share or shares original and "accruing which their parent would have taken by survivorship, "and the share of any of my said sisters dying without "leaving lawful issue shall be divided among the survivors of them "and the lawful issue of any of them as may have died before me "leaving such issue in equal shares per stirpes." At the date of the execution of this document the testatrix had six sisters living ; a seventh had died leaving a daughter who survived the testatrix.

Held (per Viscount Simon, Lord Macmillan and Lord du Parcq, Lord Thankerton and Lord Simonds dissenting) that the daughter of the deceased sister was not entitled to a share of the residue, since, on the true construction of the trust disposition and settlement, the class referred to was that of the sisters alive at the date of its execution.

Wardlaw's Trustees v. Lennox's Executor, 1940, S. C. 286, distinguished.

Decision of the First Division of the Court of Session (sub nom. *McKinnon's Trustees v. Brownlie*) 1946, S. C. 94, reversed.

APPEAL from the First Division of the Court of Session.

Mrs. Catherine Ker McKinnon, formerly Mackintosh (hereinafter called "the testatrix") died childless on May 5, 1944, leaving a trust disposition and settlement dated August 8, 1942, and a number of codicils of which only the second and third, dated respectively January 16 and November 8, 1943, are material. By her settlement, after stating her desire "to regulate the succession to my means and estate after my "death" and providing for payment of debts and expenses and certain pecuniary legacies, she directed her trustees as

* *Present* : VISCOUNT SIMON, LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS and LORD DU PARCQ.

H. L. (Sc.) follows: " (Third) My trustees shall as soon as convenient
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 —
 MACKINTOSH " after my decease realize the whole residue of my means and
 OR " estate heritable and movable and shall divide the same
 MILLER " equally between my sisters and brother: And it is hereby
 v. " declared that in the event of any of my said sisters and
 GERRARD. " brother who may have predeceased me, leaving lawful issue,
 — " such issue shall be entitled to the share or shares original
 " and accruing which their parent would have taken by
 " survivance, and the share of any of my said sisters or brother
 " dying without leaving lawful issue shall be divided amongst
 " the survivors of them and the lawful issue of any of them
 " as may have died before me leaving such issue in equal
 " shares per stirpes." By her codicil of January 16, 1943, she
 revoked the bequest of a share of residue in favour of her
 brother and in lieu thereof directed her trustees to retain in
 their hands the capital of his share and pay him the free
 revenue thereof, with such power in regard to encroaching
 on capital as was therein mentioned and, on his death, or on
 her death, in the event of his predeceasing her, to divide the
 said share among her sisters or their issue as provided for in
 her trust disposition and settlement. By her codicil of
 November 8, 1943, she recalled the direction to her trustees
 to pay him the revenue of a share of her residue and the power
 to encroach on capital for his benefit and declared that neither
 he nor his issue should have any interest whatever in any part
 of her estate, whether capital or revenue. In all other respects
 the relevant passage stood unaltered down to her death. She
 had only one brother, John Mackintosh, and seven sisters.
 She was survived by her brother and three sisters, Mrs. Matilda
 Miller, Mrs. Christina Morris and Mrs. Isabella Millar, the
 third parties in the suit, who were the appellants in the appeal.
 Three other sisters, Elizabeth and Emma, who were unmarried,
 and Mrs. Margaret Kirk, who was married but left no issue,
 were alive at the date of the settlement, but died before the
 testatrix. The seventh sister, Mrs. Jessie Miller, died before the
 date of the settlement in April, 1937, leaving one child,
 Mrs. Mary Ann Brownlie (hereinafter called " the respondent
 " niece ") the second party in the suit, who survived the
 testatrix and was a respondent in this appeal, the trustees of
 the settlement, the first parties in the suit, being also respon-
 dents. On these facts the question of law submitted on special
 case to the Court of Session was whether on a sound construction
 of the testatrix's testamentary writings the respondent niece

was entitled to participate in the residue of the estate. The question was answered in the affirmative by the First Division, which consisted of Lord President Normand, Lord Carmont and Lord Moncrieff. The Court held itself bound by *Wardlaw's Trustees v. Lennox's Executors* (1), a decision to which the Lord President and Lord Moncrieff were parties. The appellants appealed to the House of Lords.

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Montgomery K.C. and *George Reid* (both of the Scottish Bar) for the appellants. The question is whether the estate falls to be divided into three shares, as the appellants contend, or into four, as the respondent niece contends. Three points are relied on. (1.) The class originally instituted in the settlement was that of the sisters and brother of the testatrix who were alive at the date when the settlement was executed. (2.) It was only in the event of her "said sisters, and brother," who were alive the date of the settlement, predeceasing the testatrix leaving lawful issue, that such issue were entitled to the share which their parent would have taken by survivorship of the testatrix. One should stop at the end of the first phrase ("divide the "same equally between my sisters and brother"), which limits once and for all the meaning of the word "sisters" and indicates that she did not intend her trustees to set aside a share for the deceased sister. (3.) The mother of the respondent niece died before the settlement was executed and so was never instituted. Accordingly the respondent niece cannot take as a conditional institute. The destination under construction falls to be construed as a conditional institution and not as a direct and independent gift to the issue of the sisters and brother of the testatrix. The court proceeded not on the words of the settlement but on the authority of three previous cases, which were wrongly decided and, in any event, were distinguishable: *Baird's Trustees v. Crombie* (2); *Wardlaw's Trustees v. Lennox's Executor* (1) and *Muir's Trustees v. Coats* (3). These were inconsistent with earlier cases on the same topic. Till *Baird's Trustees v. Crombie* (2) there was no trace of the theory of the independent institution of issue. It was out of line with the older cases, viz., *Sturrock v. Binny* (4); *Rhind's Trustees v. Leith* (5); *Low's Trustees v. Whitworth* (6) *Stewart's Trustees v. Walker* (7) and McLaren on Wills and

(1) 1940 S. C. 286.

(2) 1926 S. C. 518.

(3) 1942 S. C. 65.

(4) (1843) 6 D. 117.

(5) (1866) 5 M. 104, 109.

(6) (1892) 19 R. 431, 436.

(7) (1905) 12 S. L. T. 801, 802.

H. L. (Sc.) Succession (3rd ed.), vol. 2, p. 810, para. 1484. It is not accepted that there is no difference between English and Scottish law on this point, but in England there are two divergent lines of authority: see *Christopherson v. Naylor* (1); *Loring v. Thomas* (2); *In re Hotchkiss's Trusts* (3); *In re Chinery* (4); *Gorringe v. Mahlstedt* (5); *In re Lambert* (6); *Barraclough v. Cooper* (7); *In re Walker* (8) and *In re Birchall* (9). This case is within *Christopherson v. Naylor* (1) and not *Loring v. Thomas* (2). The question of law should be answered in the negative.

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Clyde K.C. and *Guthrie* (both of the Scottish Bar) for the respondent niece. On principle and on the sound construction of the settlement the question in law should be answered in the affirmative, since the respondent niece must be held to be an original and independent institute, the deed conferring an original gift on the issue of predeceasing sisters. It is clear that the testatrix intended to bequeath a share of the residue of her estate to the issue of her sister who was dead at the date of the execution of the deed. That sister being dead, the accrual clause applied to the respondent niece. The phrase "who may have predeceased me" expands the words "my sisters" to include this daughter of a deceased sister. If the testatrix had intended to exclude her, it would have been easy for her to do so by apt words clearly expressing such an intention. To exclude her would be capricious and the deed should not be so construed. This deed should be read as a whole in the light of the following submissions: (a) It depends on the language of the deed whether or not the testatrix intended to exclude the issue of a sister already dead at the date of the deed; here the initial words, which may be ambiguous, are explained by the subsequent provisions. (b) If the words are wide enough to be no less applicable to the issue of a sister dead at the date of the deed than to one then living, they should be held to embrace both. (c) If elsewhere in the deed provision were made for the issue of a sister dead at the date of it that would be a pointer to their exclusion from participation in the residue and it is a circumstance of importance that there is no provision elsewhere for the respondent.

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| (1) (1816) 1 Mer. 320, 325. | (5) [1907] A. C. 225. |
| (2) (1861) 1 Dr. & Sm. 497, 498, | (6) [1908] 2 Ch. 117. |
| 510, 511, 514. | (7) [1908] 2 Ch. 121 n. |
| (3) (1869) L. R. 8 Eq. 643, | (8) [1930] 1 Ch. 469, 476-8. |
| 648. | (9) [1940] Ch. 424, 427, 428. |
| (4) (1888) 39 Ch. D. 614, 617-19. | |

(d) If the issue are to take the share which their parents would have been entitled to take if they had survived the testatrix, the words here used are apt to include the issue of a predeceasing parent, but if the issue are to take only the share previously given to the parent, then the issue of a parent who died before the date of the deed will not take. The outlook of these words is back into the past and the phrase "sisters and brother" includes all the sisters of the testatrix. In Scottish law a will is deemed to have been made the moment before the breath leaves the body: *Nimmo v. Murray's Trustees* (1). If this deed be so read there is no reason to exclude from its benefits the lawful issue of the sister who died in 1937 and whose case is thus covered by the words "who may have predeceased me." Since 1926 there has been a consistent and unbroken chain of authority in Scotland showing that such words as these are apt to express the meaning for which the respondent niece contends: *Baird's Trustees v. Crombie* (2); *Wardlaw's Trustees v. Lennox's Executor* (3) and *Muir's Trustees v. Coats* (4). *Sturrock v. Binny* (5) is distinguishable on the facts. The passage in McLaren on Wills and Succession (3rd ed.), vol. 2, p. 810, para. 1484, is explicable by the fact that it was published in 1894 before the decision in *Wardlaw's Trustees v. Lennox's Executor* (3). There is the same dual current of authority in England as in Scotland. *Christopherson v. Naylor* (6) was a plain case of an intention to exclude persons already dead at the date of the will. *Loring v. Thomas* (7); *Gorringe v. Mahlstedt* (8); *In re Lambert* (9); *Barraclough v. Cooper* (10); *In re Walker* (11) and *In re Birchall* (12) are not reconcilable, but the present case falls within *Loring v. Thomas* (7) and *Barraclough v. Cooper* (10) in England and *Baird's Trustees v. Crombie* (2) and *Wardlaw's Trustees v. Lennox's Executor* (3) in Scotland.

Montgomery K.C. in reply. The initial gift is to the sisters and brother of the testatrix and not to issue. The destination to issue is derivative from their parents. The respondent's submission depends on including issue in the initial gift in accordance with what Lord Moncrieff said in the present

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(1) (1864) 2 M. 1144.

(2) 1926 S. C. 518.

(3) 1940 S. C. 286.

(4) 1942 S. C. 65.

(5) (1843) 6 D. 117.

(6) 1 Mer. 320.

(7) 1 Dr. & Sm. 497.

(8) [1907] A. C. 225.

(9) [1908] 2 Ch. 117.

(10) [1908] 2 Ch. 121 n.

(11) [1930] 1 Ch. 469.

(12) [1940] Ch. 424.

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THE HOUSE took time for consideration.

Feb. 7, 1947. VISCOUNT SIMON: My Lords, the testatrix, at the date of the making of her settlement, had six sisters living: a seventh sister had already died, leaving a daughter who survived her aunt the testatrix, and who is the second party in the suit and a respondent in the appeal. This lady maintains that, as she is the lawful issue of a sister of the testatrix who predeceased the testatrix, she is entitled, on a sound construction of the testatrix's settlement, to a share of the residue of the trust estate along with the third parties, the appellants. With all respect to those who think otherwise, I am most definitely of opinion that this claim is unfounded, and that the decision of the Court of Session should be reversed. Granted that, alike by English and by Scots law, a will, "speaks from death," we are entitled, and indeed bound, for the purpose of giving the proper meaning to the words used, to consider the family situation when the settlement was made. At that date, as already stated, the testatrix had six sisters living, and I cannot entertain any doubt that when she directed her trustees to divide the residue of her estate "equally between my sisters," her words meant that if these six sisters were all living at her death each should receive one-sixth part. It is, in my opinion, inconceivable that she intended her dead sister to be counted among "my sisters": a bequest to a person known to be dead seems to me to be an absurdity. As Lord Cockburn observed in *Sturrock v. Binny* (2) (where a testator provided that the residue of his estate "shall belong equally to all my nephews and nieces"): "How is it possible that the testator . . . could describe 'Isabel, who was dead, as one of his 'nephews and nieces'?" I do not overlook that Lord Cockburn's observation was made in a case where the primary gift was of *liferents*, and he relied on this. But the observation that a testator cannot be presumed to confer a benefit on a person he knows to be dead is true generally, and in the present case is involved in the admission that the disputed claim must fail unless it is an original as opposed to a derivative gift. I conclude that the class referred to is not that of the testatrix's sisters alive or

(1) 1946 S. C. 94, 97.

(2) 6 D. 117, 124.

dead, but the more limited class of sisters who were alive on August 18, 1942.

It is urged that one must not take the phrases in the third purpose bit by bit, but must read the relevant paragraph as a whole. I agree, and certainly mean to do so, but it is essential for this purpose first to attach the proper meaning to the words "my sisters." If these words mean, as I think they must, "my six sisters now living," everything that follows falls into place. The "said" sisters (the word "said" is twice used) can only mean the six sisters already referred to, and it is only the lawful issue of one or more of the "said" sisters which take any share "which their parents"—i.e. one of the six—"would have taken by survivance." Obviously, the testatrix had before her mind three possibilities. In the interval between the making of the settlement and her own death, one of three things would happen. The first possibility was that all her six sisters would survive her own death: in that event each would receive a sixth of the residue. The second possibility was that one or more of the "said" six might predecease her, but leave lawful issue: in that event the issue would be substituted for the parent. The third possibility was that one or more of the "said" six might predecease her without leaving lawful issue: in that event what would otherwise have gone to that sister and, failing her, to her issue, would fall into the fund to be equally distributed among the surviving sisters and—if any of the "said" sisters had died in the meantime leaving issue—the motherless issue. By this accretion the original division into six shares would become a division into five or four or fewer shares, according to the number of stirpes surviving from the original six. I see no escape from this analysis, which to my mind is reasonably plain and which does not involve reading into the document anything which is not there. Indeed, any other view must, I think, be based on the idea that when the testatrix first provided benefits for "my" sisters, she meant to include—like the "simple child" in Wordsworth's poem entitled "We are Seven"—a sister who was to her knowledge already dead. I cannot agree. Reliance, I understand, is placed on the phrase "who may have predeceased me" and it is of course true that the mother of the respondent niece predeceased the testatrix, but that is nothing to the point for the antecedent to this relative clause is "any of my said sisters," and the mother of the respondent

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niece is not one of the "said" sisters. Mr. Clyde conceded that the respondent niece could only succeed if the words of the will made her an original and independent institute, i.e. if the language was equivalent to a direction to divide the residue equally between my sisters now living and a niece who is the issue of my sister now dead. It would be easy to say so, but for the reasons already given, I consider that there is no ground for inferring that there is a primary gift to this effect.

It is suggested that the construction at which I arrive is contrary to case law, and in particular to the decision of the Court of Session in *Wardlaw's Trustees v. Lennox's Executors* (1). Indeed, it was this precedent which forced the court to decide as it did. I would first observe that the help provided towards construing a collocation of ordinary words in one will by observing the construction put upon a different collocation of words in another will is distinctly limited. Our attention was not called to any previous case in which the limiting words "the said" were used, or in which the phrase occurred "who may have predeceased me"—the "may" may be significant as indicating the uncertainties of the future when looking forward at the date of making of the settlement. In so far as reported decisions on the interpretation of other wills afford a guide, it appears to me that there are decisions which support the conclusion to which I come. Take, for example, the judgment of Kay J. in *In re Webster's Estate. Widgen v. Mello* (2). There the testator bequeathed property "to all the children of [X], or in event of decease to their descendants share and share alike." "To their descendants" is, I apprehend, equivalent to "to the descendants of the said children." X had six children, of whom five were living at the date of the will (and at the death of the testator), and one had died prior to the date of the will leaving issue an only daughter. It was held that the last-named had no right to share in the property, which went to the five children who survived the testator. Kay J.'s decision thus was that "all the children of X" meant such of the children of X as were living at the date of the will, and that "their descendants" meant the descendants of such children only. The learned judge's formulation of the "settled rule" is instructive (3). The words in that will are very close to those in the present

(1) 1940 S. C. 286.

(3) *Ibid.* 739.

(2) (1883) 23 Ch. D. 737.

case, and the decision, which is in line with *Christopherson v. Naylor* (1), entirely supports the present appellants. As for *Loring v. Thomas* (2), where there was a gift to the children of A, and then a gift to the issue of any child (not "of any" of the said children") who might be dead of the share which the parent would have taken if living, *Kindersley V.-C.* pointed out that the latter gift was not necessarily a substitutional gift, but a gift to the issue of the share which the parent of the issue would have taken if living at the death of the testator, which might well include the children of a parent who was dead at the date of the will. But it is particularly to be noted that the Vice-Chancellor (3), when including among the beneficiaries the issue of any child of A who was dead before the will was made, contrasted this "large and general" conclusion with the situation arising if the gift had been expressed to be "to the issue of any of the said children of X"—the very restriction which occurs in the present settlement. *Barracrough v. Cooper* (4), was a decision of this House in 1905 approving *Loring v. Thomas* (2), on the point that a gift in a will to issue of children that "shall die in my lifetime" might be understood to include the issue of children who died before the will was made. But that has nothing to do with the restrictive effect of the words "the said children" or "the said sisters" as the case may be. The Court of Session in the present case does not seem to have observed this distinction, and thus felt itself governed by its previous decision in *Wardlaw's Trustees* (5). But in *Wardlaw's Trustees* (5), as in *Loring v. Thomas* (2), there were no words limiting the benefit to the issue of a parent who was living at the date when the testamentary disposition was made: here the words "the said sisters" do, in my opinion, plainly effect such a limitation. For a similar reason, I prefer the dissenting judgment of Lord Justice-Clerk Alness in *Baird's Trustees v. Crombie* (6) to the decision of the majority. In conclusion, I would venture to remind your Lordships of Lord Halsbury L.C.'s insistence in *Barracrough's* case (4) that what chiefly matters is to ascertain the intention of the testator as expressed by the words of his own will. "It seems to me," said the Lord Chancellor (7), "that the last thing one ought to

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(1) 1 Mer. 320.

(2) 1 Dr. & Sm. 497.

(3) Ibid. 514, 515.

(4) [1908] 2 Ch. 121 n.

(5) 1940 S. C. 286.

(6) 1926 S. C. 518.

(7) [1908] 2 Ch. 121, 124.

H. L. (Sc.) “do would be to attempt to make a canon of construction
 1947 “which could guide the court in interpreting all wills. That
 MACKINTOSH “is certain to lead to error. There are some technical phrases,
 OR “and there are some phrases which have become almost
 MILLER “technical, having received a construction, with regard to
 v. “a will, which we cannot get rid of ; but I cannot help thinking
 GERRARD. “that half the disputes arise from a consideration of what
 Viscount Simon. “these canons of construction mean unaffected by the cir-
 “cumstances of each particular case. If you lay down a
 “canon of construction which is supposed to meet every case,
 “you are absolutely certain to go wrong.” Having reached
 a clear view as to the meaning to be attached to the words in
 this particular document, I move that the appeal be allowed.
 By agreement between the parties, costs before this House,
 taxed as between solicitor and client, will be paid out of the
 residue of the trust estate. The order as to costs below will
 not be disturbed.

LORD THANKERTON (read by LORD SIMONDS). My Lords,
 I have had the privilege of considering the opinion delivered by
 my noble and learned friend on the woolsack, and the opinion
 about to be delivered by my noble and learned friend Lord
 Simonds, and I find myself in complete agreement with the
 views expressed by Lord Simonds and his conclusion that the
 appeal should be dismissed. In view, however, of the difference
 of opinion among your Lordships I will add some further
 observations. The solution of the question raised in this appeal
 depends on whether the issue of a predeceasing sister took as
 conditional institutes or by direct gift. It is axiomatic that
 you cannot have a conditional institution unless you have a
 previous institution, and the present question will be clearly
 tested and settled according as one of the sisters alive at the
 date of the will, but who predeceased the testatrix, would be
 held to have been instituted or not. The most noticeable
 thing about this residuary bequest is that the bequest is to
 sisters as a class, so far as it relates to sisters ; there is no
 element of individuality in the gift until you come to refer to
 individual members of the class, who, by predecease of the
 testatrix, have dropped out of the class. It appears to be
 only by limiting the class to its membership at the date of the
 will, and, as I understand, holding that there was an initial
 institution of the class so constituted, that a case of conditional
 institution can be arrived at. In my opinion there is no

justification in the present case for going back to the circumstances as they existed at the date of the will. In Scots law, a will not only speaks from death but "the same construction" must be applied to the bequest as if the deed had been "written out and executed by him at the last moment of his" being of a disposing mind." per Lord Cowan in *Nimmo v. Murray's Trustees* (1), after approval of Lord Corehouse's dictum in *Hyslop v. Maxwell's Trustees* (2). The terms of the will, however, may be so expressed as to refer to the circumstances at the date of the execution of the will, as in *Sturrock v. Binny* (3), to which I will refer later; or there may be ambiguity as to the identity of a beneficiary or the subject matter of a bequest such as requires a reference to the circumstances at the date of the execution of the will.

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Looking, then, at the terms of the present bequest, I find that it relates only to the state of matters at the death of the testatrix, and distribution of the realized residue of her estate after her decease; I find nothing which suggests a reference to the circumstances existing at the date of execution of the will. If you isolate the first sentence, then you may have the institution of a class which excludes any issue of the members of the class, and such issue can only take as conditional institutes under the subsequent part of the bequest. But I am not prepared so to isolate the first sentence, and, in my opinion, the bequest taken as a whole, is a direct bequest, at her death, to a composite class, consisting of the class of her sisters as then constituted, along with the issue, per stirpes, of sisters who are no longer members of that class. The word "said" sisters is perfectly consistent with this view, and to give the word "said" the restricted meaning which it would require in a deed, appears to me to be quite inappropriate in the case of a will.

I agree with the comments of my noble and learned friend Lord Simonds on the English decisions, but I desire to refer to some of the Scottish decisions. In *Sturrock v. Binny* (3), the terms of the will were very different from the terms of the present will, and one vital difference is expressed as the main ground of his decision by Lord Cockburn, where he says (4): "I hold that the case depends essentially upon the construction of the two clauses, the one destining the residue, and the other declaring, 'and in case any of my said nephews or

(1) 2 M. 1144, 1148.

(3) 6 D. 117.

(2) (1834) 12 S. 413, 416.

(4) Ibid. 124.

H. L. (Sc.) “ ‘nieces shall have predeceased me,’ etc. How is it possible
 1947 “that the testator, in the first of these clauses, could describe
 MACKINTOSH “Isabel, who was dead, as one of his ‘nephews and nieces’?
 OR “He gives the residue of his property to them in liferent, and
 MILLER “to their children in fee; plainly meaning that it was to be
 v. “given to those nephews and nieces who were in life. Through-
 GERRARD. “out the deed he plainly had no contemplation of any fee
 Lord “emerging, except upon the termination of a liferent.” With
 Thankerton. all respect to my noble and learned friend, I feel sure that
 Lord Cockburn would have protested against his second
 sentence being taken out of its context, and quoted as a general
 statement, without the clear reason that he gave for it—
 a reason which does not exist in the present case. It may also
 be noted that in that case, the children of the niece who
 predeceased the execution of the will were specially provided
 for. In the case of *Baird’s Trustees v. Crombie* (1), the crucial
 point of the case was the proper construction of the clause as
 to the contingency of predecease, the terms of which were,
 “in the event of any of my brothers or sisters predeceasing me
 “leaving lawful issue,” which are markedly different from
 those of the present case—“in the event of any of the said
 “sisters . . . who may have predeceased me, leaving lawful
 “issue,”—which, on the authorities, are admittedly capable of
 referring to predecease of the testatrix at any time, whether
 before or after the execution of the will. If Lord Justice-Clerk
 Alness, who dissented, were right in his view that the clause
 in *Baird’s* case (1) referred only to future predecease of the
 testatrix, then I am not concerned with that view in the
 present case; but if he were wrong in that view, the basis of
 his whole opinion disappears, and I am equally little concerned
 with it. The main rule is that persons who predecease the
 testator cannot take under the will, but a bequest to the class
 as it exists at the time of the testator’s death, and to the issue
 of members of the class who have previously dropped out of
 the class, is not only consistent with the rule, but secures the
 complete stirpital division, which was clearly contemplated
 in the present case. There is no suggestion in the terms of
 the will of an intention to exclude any particular stirps.

In conclusion, I desire to express my concurrence in the
 opinion of Lord President Normand in the present case, and in
Wardlaw’s Trustees v. Lennox’s Executors (2) upon which it
 is based.

(1) 1926 S. C. 518.

(2) 1940 S. C. 286.

LORD MACMILLAN (read by LORD PORTER). My Lords, the sole question is whether the respondent Mrs. Brownlie, the daughter of the sister who predeceased the making of the will, is entitled to a share of the residue along with her three aunts, the appellants. Is the residue divisible into three parts or into four? Your Lordships have been exhorted, times without number and by the highest authority, when construing a will, to read the document by itself and to "give the natural meaning to the words and the sentences therein contained." So said the Earl of Halsbury in *Gorringe v. Mahlstedt* (1), and added: "I believe that half the difficulties have arisen by adopting some words that learned judges have used on another occasion with reference to another will as if it was a canon of construction for all wills." With this admonition in mind I proceed to examine the language which the testatrix has used. She directs her trustees to divide the residue of her estate "equally between my sisters." To my mind it is clear beyond all doubt that when she used the words "my sisters" she did not include her sister who had died five years previously. Testators do not make bequests in favour of persons whom they know to be dead. But it is said that the declaration appended to the initial bequest expands the words "my sisters" so as to include, not the sister who was dead at the date of the will, but the daughter of that deceased sister. I cannot so read the declaration. It opens with the words "in the event of any of my said sisters . . . who may have predeceased me, leaving issue." "My said sisters" are the sisters to whom she has just made her residuary bequest and do not include the sister who was dead. It was common ground that if the niece in question was to participate in the residuary bequest it could not be as a conditional institute, for a conditional institute takes in substitution for a primary institute and, her mother not having been primarily instituted, the niece was not conditionally instituted in her mother's place. (See M'Laren on Wills and Succession, 3rd ed., vol. 2, p. 810.) If the niece is to participate it must therefore be not derivatively but in her own right as a primary institute. This means that the bequest of residue must be read as if it directed an equal division "between my sisters and the daughter of my deceased sister." I can find no warrant in the will for such an interpolation, which in my opinion contravenes the plain language which the testatrix has used.

(1) [1907] A. C. 225, 226.

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The declaration introducing the issue of predeceasing sisters refers expressly to the issue of "my said sisters," that is, to the issue of the sisters primarily instituted, of whom the sister already deceased at the date of the will was not one. The daughter of that sister can therefore take no benefit from the declaration; she is not the issue of any of "my said sisters." Moreover, the whole tenor of the declaration, as I read it, points to what may happen in the interval between the making of the will and its coming into operation on the death of the testatrix. She first makes an initial gift to her sisters, that is, to her living sisters, and then it occurs to her that some of them may die before her, leaving issue, so she goes on to provide for that event. When she speaks of "the share of" "any of my said sisters dying without lawful issue," the testatrix seems to me plainly to be referring to the share of any of her six sisters alive at the date of her will. Nothing could have been easier than to use language which would clearly have conferred upon the niece a right of participation in the residue, but the testatrix has not done so.

A study of the cases in this branch of the law, and there are many of them, yields no very profitable results. They show only, as Kindersley V.-C. said in *Loring v. Thomas* (1), in language approved and adopted in this House in 1905 by Lord Macnaghten in *Barraclough v. Cooper* (2) that "when" "a testator directs that issue shall represent or stand in the" "place of or be substituted for a deceased child, and take the" "share which their parent would have taken if living, he may" "intend such representation or substitution to apply only to" "the case of a child dying subsequently to the date of his will" "and before the time of his own death; or he may mean it" "to extend also to the case of a child who was already dead" "at the date of the will. The solution of the question, which" "of the two he intended, must of course depend on the" "language he has used in directing such representation or" "substitution." A very slight difference in language may turn the scale and bring it down either on one side or the other. On the one side is the series of cases headed by *Christopherson v. Naylor* (3) and represented in this House by *Gorringe v. Mahlstedt* (4); on the other side is the series of cases of which *Loring v. Thomas* (5) and, in this House, *Barraclough v. Cooper* (6)

(1) 1 Dr. & Sm. 497, 510.

(2) [1908] 2 Ch. 121 n., 125.

(3) 1 Mer. 320.

(4) [1907] A. C. 225.

(5) 1 Dr. & Sm. 497.

(6) [1908] 2 Ch. 121 n.

are typical. Much ingenuity has been spent or misspent in seeking for refined points of distinction or reconciliation among the cases, but the attempt to extract from them "any kind of canon of construction" is, in Lord Halsbury's robust pronouncement in *Barraclough v. Cooper* (1) "certain to lead to error." I find it enough to say that in the present case the language used by the testatrix seems to me susceptible only of one meaning.

In the Court of Session the learned judges of the First Division did not enter upon the merits of the case, conceiving themselves bound to decide in favour of the niece by the authority of *Wardlaw's Trustees v. Lennox's Executors* (2), which was based on the decision in *Baird's Trustees v. Crombie* (3) and other Scottish cases, as well as on a consideration of English authorities. But the Scottish cases, like the English cases, turn in each instance upon the language of the particular will and some go one way and some the other. The words employed in the case of *Wardlaw's Trustees* (2) are not identical with those employed in the present case, and I need not say whether I should have reached the conclusion there arrived at, but as regards the case of *Baird's Trustees* (3) where the language again was different, I prefer the dissenting opinion of Lord Justice-Clerk Alness. I would allow the appeal and answer the question appended to the special case in the negative.

LORD SIMONDS : My Lords, this is a question of construction familiar to both Scottish and English courts and I do not find any difference in the principles of law or canons of construction to be applied in its solution. Some difference of language there is. Thus in the present case it is agreed that the correct question is whether the bequest in favour of issue of the sisters of the testatrix is a conditional institution of such issue or whether the issue are directly and independently instituted and it is agreed that, if it is a conditional institution, the respondent can take no share and this appeal must succeed. In England the question would rather be whether the gift to issue is a substitutional or is an independent and original gift to them. And, if the question is so asked, the respondent must fail if it is held that the gift to issue is substitutional. In neutral language the question is simply whether this

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(1) [1908] 2 Ch. 124.

(3) 1926 S. C. 518.

(2) 1940 S. C. 286.

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testatrix by the words that she has used intended to include or to exclude the issue of a sister who was dead at the date of her will. Some weight has been given, and perhaps properly given, in cases of this kind to the fact that the settlement is in the nature of a family settlement and there is a leaning towards the view that a settlor would not without apparent reason exclude a branch of the family which would appear to have an equal claim. I need not remind your Lordships how pervasive in our family law is the idea that inequality is capricious and to be avoided. But ultimately it is only by the language that she has used that the intentions of the testatrix can be determined and I turn again to the material clauses of her will.

In the opening words of her will the testatrix asserts that she is looking forward to the day when she is dead and there must be a succession to her means and estate. That is after all the common intention of testators. It is why they make their wills. But a will is an instrument *sui generis* in that it has not, and is not intended to have, any operation at the moment of its execution. It will operate (if at all) at some uncertain date in the future when the circumstances may be different. It is for this amongst other reasons that it is sometimes said that the will "speaks from the death," an expression nevertheless to be used and applied with caution. In dealing with a Scottish will I prefer to say, as Lord Cowan said in *Nimmo v. Murray's Trustees* (1): "The same construction must be applied to the bequest as if the deed had been written out and executed by him at the last moment of his being of a disposing mind." The testatrix, then, makes her will looking forward to her death and knowing that it will be read as if executed by her at the last moment of her being of a disposing mind. She has had seven sisters and a brother. Let it be assumed that at the date of actual execution of her will she knew the whole family history, who were alive, who dead, and whether those that were then dead had left any issue. She could not foretell what the family circumstances would be at the date of her death. In this light I read the material clause.

May I begin by repeating the words used by the Lord President in this case (2): "In this type of case especially I agree with Lord Ormidale's view that the testator's directions should be read as a whole and not bit by bit . . .

(1) 2 M. 1144, 1148.

(2) 1946 S. C. 94, 98.

"in order to ascertain the true intention" ? So, when I find that the first named objects of the testatrix's bounty are "my sisters and brother" I do not stop there and say irrevocably that the "sisters" are the sisters living at the date of the will and to that meaning the rest of the will must conform, but I read on to see what consistently with the rest of the will the word "sisters" must mean. I agree that if there was no context "sisters" could not mean sisters dead at the date of the will, for a bequest cannot be made to a dead person. But this is equally true of sisters living at the date of the will but dying before the testatrix. In any view in the terms of effective bequest the word "sisters" must be expanded to "those of my sisters who survive me." That at least the testatrix must have meant when she used the single word "sisters" and I would remind your Lordships that, unless that was the meaning of her words the surviving sisters could not as a class take the whole estate. I am assuming of course in this observation that the bequest is simply to "my sisters." Here at once is seen the difference between a will and a deed intended to take immediate effect inter vivos. For in the latter instrument an immediate gift to "my sisters" is a gift to all my sisters living at the execution of the deed, and it needs no amplification or qualification. I am reluctant at this early stage to refer to authority, but I must observe that if it were right to stop, as the appellants' counsel would have us stop, at the end of the first phrase and limit once and for all the meaning of the word "sisters," it would have been equally right so to have stopped and limited the meaning of the word "children" in *Barraclough v. Cooper* (1), or in *Loring v. Thomas* (2), or in a score of other cases in which the court yet declined to do so, but proceeded to interpret that phrase in the light of the words that followed. So I too decline to commit myself until I have read what follows and I find that the words "between my sisters," which I repeat must mean "such of my sisters as shall survive me," are followed by the words which I have already set out verbatim in this opinion and need not restate. One parenthetical observation I make before examining the all-important words. It is that they appear to me to have been taken out of their proper setting from a disposition of first a life interest and then a fee. The words "share or shares original and accruing" are quite inappropriate to the case where the

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(2) 1 Dr. & Sm. 497.

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shares are determined once and for all at the death of the testatrix, though they are apt enough where the shares are settled and a liferenter of a share may die without issue. So too are the final words of the bequest.

The question to which I return is : what is the meaning of the bequest read as a whole ? My Lords, I cannot feel any doubt that the sound construction of this bequest so read is that it is a comprehensive bequest to the sisters of the testatrix living at her death and the lawful issue, living at her death, of any sister who predeceased her, whenever that sister died. In simplest terms, the testatrix, asked at that last moment of her disposing power, whether she had provided for the respondent, would surely have replied, " Yes. Is she not the "lawful issue of my sister Jessie who predeceased me ? " I cannot help thinking that the question would be too clear for argument, were it not that in the second part of this composite gift the word " said " occurs before " sisters." It is worth while then to see why without the word " said " that conclusion would be reached and then to ask whether the use of that word leads to a different result. Having looked for a moment at the first part of the bequest I turn to the second part of it and find, omitting the word " said," a gift to the lawful issue of any of the sisters of the testatrix who may have predeceased her leaving lawful issue. That gift does not stand alone and I do not depart from my fundamental proposition and ask that it should be read as if it stood alone. But I do say that, whether read alone or in its present context or in any context that I can well imagine, it is a gift to the lawful issue of sisters of the testatrix who predeceased her whenever those sisters died. Lawful issue must satisfy two conditions : first, they must themselves survive the testatrix ; secondly, they must be issue of a sister who predeceased the testatrix. There would be no justification whatever for importing the further condition, that the sister should be alive at the date of the will. By " sisters " the testatrix means the class of persons who stood in a certain relation to her, and nothing else. In this part of the gift she deals with the lawful issue of those of them who do not survive her. And now, I turn again to the first part of the gift. I have explained that, the will being an ambulatory document, the gift to " my sisters " is in meaning and effect a gift " to those of my sisters who shall survive me." Here again let me state the conditions of the gift : once more they

are two. In order to take a share, a person must (a) be a member of the class of persons—standing in a certain relation to the testatrix—and (b) survive her. It is not the class of persons “my sisters” who must survive but the individual member of that class. Now I combine the two parts of this gift and find that it is a gift to such members of a certain class as shall survive the testatrix and the issue of such members of the said class as shall have predeceased her. I have deliberately used the expression “such members of the said “class.” I might as well have said “such of my said sisters.” The class here in question is composed of sisters. In the result it appears to me upon an analysis of the whole gift, that, so far from the word “said” imposing a different meaning upon it, it makes no difference at all but serves to emphasize that the gift is a composite one to members of a class living at a certain date, viz. the death of the testatrix, and the lawful issue of members of that same class who are dead at that date. I am aware that in coming to this conclusion I must dissent from a single passage in the judgment of Kindersley V.-C. in *Loring v. Thomas* (1) where he observes that the gift he was considering was not “to any of the said “children,” an observation which suggests that he would have come to a different conclusion if those had been the words of gift. But that is not a very cogent argument: for if they had been the words of gift, other considerations might have been presented to him. Nor, high though his authority is, can I be dissuaded by the fact that the late Mr. Vaughan Hawkins cites without comment the language of the Vice-Chancellor in the case cited: see his book on Wills, 3rd ed., p. 296.

My Lords, I have tried to construe this will by reference solely to its own language. But it is hardly possible to escape the influence upon one's thoughts of long-familiar authority. In particular *Barraclough v. Cooper* (2), though only reported as a note to *In re Lambert*. *Carns v. Harrison* (3), is a decision of this House, which has often been cited and followed, and, if authority can ever be helpful in the construction of wills, it will guide your Lordships to only one conclusion in this case. I do not think that it is useful to refer to many of the numerous cases upon this subject, but, having once more read a great number, if not all, of them, I think it may fairly

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(1) 1 Dr. & Sm. 497, 514.

(3) [1908] 2 Ch. 117.

(2) [1908] 2 Ch. 121 n.

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be said that there is not present in this case any one of the features which in other cases have led to the exclusion of the issue of a child dead at the date of the will. Thus there are not the words "may die" or "shall die" (see e.g. *Gorringe v. Mahlstedt* (1)), but the words "may have predeceased." The reference is not to the "parent's share" or "the share intended for the parent" (see e.g. *In re Hotchkiss's Trusts* (2)) but to the share "which their parent would have taken by "survivance." As Hall V.-C. said in *In re Woolrich. Harris v. Harris* (3), there is no magic in the words "I declare that" or "provided always" in introducing the second class of objects. To them there is given, in the words of Shadwell V.-C. in *Tytherleigh v. Harbin* (4), "an original substantive gift." And that is after all the test as the case was argued in the case now before the House. There is not here a conditional institution of issue of sisters alive at the date of the will but dying before the testatrix, but a direct and independent institution of issue of sisters predeceasing the testatrix whenever they died. In conclusion I would say that I have not thought it necessary to refer to or distinguish the earlier cases in the Court of Session. As the Lord President said in *Wardlaw's Trustees v. Lennox's Executors* (5): "The question "is one of the intention of the testator as expressed in his "will, and I think that no difference between the two systems "of law is involved" a view which I had formed myself and indeed stated earlier in this opinion. But I may perhaps add that I am in entire agreement with and would respectfully adopt the reasoning and conclusions of the Lord President in that case. I would dismiss this appeal.

LORD DU PARCQ. My Lords, the argument for the appellants in this case assumed that when Mrs. McKinnon made her will in 1942 she knew that one of her seven sisters was already dead. No one, I think, can doubt that this assumption is justified as an inevitable inference from the agreed facts. The appellants contend that when Mrs. McKinnon directed her trustees to divide the residue of her estate between her sisters, she could not have intended that they should set aside a share for the dead sister. By the words "my sisters," Mrs. McKinnon must therefore have meant "my six sisters," and the subse-

(1) [1907] A. C. 225.

(4) (1835) 6 Sim. 329, 332.

(2) L. R. 8 Eq. 643.

(5) 1940 S. C. 286, 291.

(3) (1879) 11 Ch. D. 663, 666.

quent words "my said sisters" must accordingly mean "my said six sisters." True it was that some of the six might not survive her, and the testatrix went on to provide for that possibility. The lawful issue of any of the said six sisters who might predecease the testatrix were to be entitled to the shares which their parents would have taken by survivorship. Since no share could ever have come to the sister who was dead when the will was made, that sister was not a parent who "would have taken by survivorship," and her daughter (the argument concludes) can claim nothing under the will.

The respondent's contention, as I understand it, is based on the rule of Scots law that a will must be construed as if it had been executed at the last moment of the testator's being of a disposing mind. If this will is read as if it had been executed by Mrs. McKinnon just before her death, it is said that there is no reason for excluding from its benefits the lawful issue of the sister who died in 1937. That sister predeceased the testatrix, and her case, it is said, is therefore covered by the words "who may have predeceased me." The respondent adopts the language used by Lord President Normand in relation to the words of the will which was under consideration in *Wardlaw's Trustees v. Lennox's Executors* (1), when he said " . . . The testator has projected his mind forward to the date of his death, and looks back from that event without any limit of time such as the date of the execution of the will." The respondent supports her contention by asserting that the exclusion of the issue of one sister only would appear to be a capricious exercise of disposing power and that your Lordships ought accordingly to regard with disfavour the construction for which the appellants contend.

My Lords, in my opinion the appellants' contention is right. There is no rule of law which compels the court to disregard for all purposes every point of time except the latest moment when the testator had a disposing mind, and it would, I am sure, often defeat a testator's intentions if those who are called upon to construe his will were to shut their eyes to the facts as they existed at the date when the will was made. A woman who knows, as Mrs. McKinnon knew, that one of her sisters is dead, though she may project her mind forward to the date of her own death, is, to say the least, unlikely to make a bequest to that sister. In a case where the subsequent birth of a sister or sisters was a possibility she would, as a general rule, be

(1) 1940 S. C. 292.

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H. L. (Sc.) taken to know that the expression "my sisters" might be read to include those as yet unborn when the will was made. But one who looks to the future cannot forget the past or ignore the finality of death, and, in the circumstances of this case, Mrs. McKinnon knew that, whether she died at once or lived for many years, there could be at most six sisters to share her bounty. The respondents' construction appears to me to be unduly artificial and leaves me unconvinced. I am not moved at all by the suggestion of "caprice." There is nothing here like the "whimsical" and "cruel" result (the epithets are Lord Macnaghten's) which would have followed if the appeal in *Barracrough's* case (1) had been allowed in this House. It is by no means necessarily capricious to make bequests to some of one's nephews and nieces and not all of them. Even if it were, in a case where the language of a will is plain the courts must resist any temptation which they may feel to construe it in another sense in order to make what seems to them to be a more equitable division of a testator's estate.

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I have had the advantage of reading in print the opinions of my noble and learned friend on the woolsack and of my noble and learned friend Lord Macmillan, and I respectfully agree with all that they have said as to the English as well as the Scottish authorities and as to the limited use which it is legitimate to make of authority when construing a will. I desire to add only two comments. First, I venture to suggest to your Lordships, with the greatest respect for the Court of Session, that their opinion that they were, as Lord Carmont put it (2), "really bound by the case of *Wardlaw's Trustees*" (3) is an unhappy example of the use of precedent. In the case of *Wardlaw's Trustees* (3), the will was a holograph will and was made without the assistance of a lawyer. The court was helped to its conclusion by this fact, which both the Lord President (4) and Lord Fleming (5) emphasized. "The 'testator,'" said the Lord President, "chose to make his will 'without the advantage of professional aid or advice, and it is 'quite legitimate to have this in mind, if the machinery which 'he has devised creaks.'" The will now before your Lordships bears the imprint of the lawyer's hand, and I do not find its meaning obscure. It would, I think, be unfortunate if a benevolent interpretation, which the ill-chosen language of a

(1) [1908] 2 Ch. 121 n., 125.

(4) Ibid. 293.

(2) 1946 S. C. 94, 98.

(5) Ibid. 295.

(3) 1940 S. C. 286.

layman may have justified, were henceforth to be regarded in Scotland as a rigid canon of construction, and if it were thus suggested to conveyancers they they might take Mr. Wardlaw's method of expression as a model. This would be to mistake an exception for a rule. Secondly, I think that an interesting passage in the current edition of Jarman's Treatise on Wills suggests that there may have been a tendency to misapply the decision in *Loring v. Thomas* (1). The passage, which will be found in vol. 2 at p. 1311 of the 7th edition, is as follows: "It cannot be denied that the rule in *Loring v. Thomas* (1) is "an artificial rule, because in applying it the court ignores "the literal meaning of the will by inferring a different intention "from provisions inserted alio intuitu. Inasmuch as it gives "effect to the meaning of the testator, it is a beneficent rule "but it strains the conscience of judges who think that when- "ever the language of a will is clear it should be construed "literally, however harsh or capricious the result may be." I am happy to think that no "rule" is laid down in *Loring v. Thomas* (1) which prevents a judge from arriving at a testator's meaning by considering the words which the testator has used, read as a whole, or from giving effect to clear language in a will. My noble and learned friend Lord Macmillan has already quoted from the judgment of Kindersley V.-C. the one proposition for which *Loring v. Thomas* (1) is an authority. In the case of *Wardlaw's Trustees* (2) the Lord President concisely and accurately stated the effect of the Vice-Chancellor's judgment when he said: "The pith and substance of "the observations of the learned Vice-Chancellor are that "you must take the language of the testator in its natural "sense and discover from it whether the issue of a parent who "predeceased the execution of the will are excluded; or "whether the language is wide enough to include them." So understood, the rule (if rule it should be called) in *Loring v. Thomas* (1) need never strain the judicial conscience, and will not conflict with what has so often been declared to be the paramount rule of construction: it is, as Lord Fleming said in *Wardlaw's* case (3), "just an example of the more "general rule that the intention of the testator must be "derived from the actual language used by him." I will only add that when the decision of your Lordships' House in

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(1) 1 Dr. & Sm. 497.

(3) Ibid. 295

(2) 1940 S. C. 286, 291.

H. L. (Sc.) *Barraclough's case* (1) was cited to the Court of Appeal in England, perhaps for the first time, and while it was as yet unreported, in the case of *In re Cope. Cross v. Cross* (2), the court (Cozens-Hardy M.R., Buckley and Kennedy L.J.J.) rightly held themselves free to decide the particular question before them upon the precise words 'of the will, and reversed a decision founded upon a similarity of language to that of the will in *Loring v. Thomas* (3). "It would be erroneous," said Buckley L.J. (4), "or misleading, to deal with this case by "reading first the will in *Loring v. Thomas* (3) and then seeing "how this will differs from that will."

My Lords, I am for allowing this appeal.

Appeal allowed.

Solicitors for appellants: *Martin & Co., for Adamson, Gulland & Stuart, S.S.C., Edinburgh, and C. & C. Boyd Coupar-Angus, Perthshire.*

Solicitors for respondent: *Beveridge & Co., for Davidson & Syme, W.S., Edinburgh, Drummond & Reid, S.C.C., Edinburgh and Miller & Gerrard, Blairgowrie.*

(1) [1908] 2 Ch. 121 n.

(3) 1 Dr. & Sm. 497.

(2) [1908] 2 Ch. 1.

(4) [1908] 2 Ch. 8.

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1946

Nov. 18, 19,
21, 22, 25,
26.

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Mar. 25.

THOMAS RESPONDENT.

Applied. SIMPSON v. SIMPSON.
[1951] 1 All E.R. 955.

Appeal — Witness action — Trial by judge alone — Question of fact — Review of judge's findings — Principles governing appellate court.

When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is

*Present: VISCOUNT SIMON, LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS and LORD DU PARCQ.

plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

Decision of the Court of Session 1946 S. C. 81 reversed.

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APPEAL from the Second Division of the Court of Session. Murray Lornie Thomas, hereinafter called "the respondent," brought an action against his wife, Mrs. Janet Thomas (formerly Watt), hereinafter called "the appellant," in which he concluded for divorce on the ground of cruelty under s. 1, sub-s. 1(c) of the Divorce (Scotland) Act, 1938. On August 17, 1945, the Lord Ordinary (Lord Patrick) assoilzied the appellant, refusing the respondent a divorce. On December 5, 1945, the Second Division of the Court of Session, whose opinion was delivered by Lord Mackay, reversed this decision, mainly on the ground that they took a different view from Lord Patrick of the facts as disclosed by the evidence given at the original hearing and of the inferences properly to be drawn therefrom. The appellant appealed to the House of Lords, the main question being whether there was sufficient justification for reversing the conclusion reached by Lord Patrick.

L. Hill Watson K.C. and *J. A. Crawford* (both of the Scottish Bar) for the appellant.

McKechnie K.C. and *Hendry* (both of the Scottish Bar) for the respondent.

Mar. 25, 1947. THE HOUSE (Lord Thankerton, Lord Macmillan, Lord Simonds and Lord du Parc, Viscount Simon dissenting) allowed the appeal. In the course of their opinions their Lordships laid down the principles on which an appellate court should act when the appeal is against the findings of fact by the trial judge, which alone call for report.

VISCOUNT SIMON. My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart

H. L. (Sc.) from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand ; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given. What I have just said reproduces in effect the view previously expressed in this House—for example by Viscount Sankey L.C. in *Powell v. Streatham Manor Nursing Home* (1), and in earlier cases there quoted. Lord Greene M.R. admirably stated the limitations to be observed in the course of his judgment in *Yuill v. Yuill* (2). Lord President Clyde, in *Dunn v. Dunn's Trustees* (3), summarized the scope of appellate correction, with copious citation of earlier authority, and I agree with him that the true rule is that expounded by Lord President Inglis in *Kinnell v. Peebles* (4), that a court of appeal should “attach the greatest weight to “the opinion of the judge who saw the witnesses and heard “their evidence” and consequently should not disturb a judgment of fact unless they are satisfied that it is unsound. It not infrequently happens that a preference for A.’s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge’s mind, rather than from an unfavourable view of B.’s veracity as such : in such cases it is

(1) [1935] A. C. 243, 250.

(2) [1945] P. 15, 19.

(3) 1930 S. C. 131.

(4) (1890) 17 R. 416, 423.

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legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this ; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B.'s evidence was due to the error, it will be justified in taking a different view of the value of B.'s evidence. I would only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration. What I have said applies to appeals from a judge sitting alone. Conclusions of fact embodied in the verdict of a jury cannot be subjected to the same degree of re-examination—for the course of reasoning by which the verdict has been reached is not disclosed—and consequently the verdict of a jury on fact must stand if there was any evidence to support it and if the conclusion is one at which a reasonable jury when properly directed might reasonably arrive.

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LORD THANKERTON. My Lords, I am of opinion that Lord Mackay, whose opinion formed the judgment of the Second Division, has misconceived or disregarded the duty of an appellate court in regard to the decision of a judge, sitting without a jury, on a question of fact (when there is no misdirection), which has so repeatedly been laid down in your Lordships' House in cases from England and Scotland alike. The only suggestion by Lord Mackay of the Lord Ordinary having misdirected himself was as to onus of proof ; but the Lord Ordinary, quite rightly, makes no reference to onus of proof, for, as has often been pointed out, no question of burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The Lord Ordinary came to a definite conclusion on the evidence, and no question of onus did, or could, arise : *Robins v. National Trust Co.* (1), per Viscount Dunedin.

I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus : I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the

(1) [1927] A. C. 515, 520.

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printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion ; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence ; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves ; and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. Normally the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present, it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

It may be well to quote the passage from the opinion of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co., Ltd.* (1), which was quoted with approval by Viscount Sankey L.C. in *Powell v. Streatham Manor Nursing Home* (2). Lord Shaw said : " In my opinion, the duty of an appellate court in those " circumstances is for each judge of it to put to himself, " as I now do in this case, the question, Am I—who sit here " without those advantages, sometimes broad and sometimes " subtle, which are the privilege of the judge who heard and " tried the case—in a position, not having those privileges, to " come to a clear conclusion that the judge who had them " was plainly wrong ? If I cannot be satisfied in my own " mind that the judge with those privileges was plainly wrong, " then it appears to me to be my duty to defer to his judgment."

(1) 1919 S. C. (H. L.) 35, 37. (2) [1935] A. C. 243, 250.

Lord Shaw had already pointed out that these privileges involved more than questions of credibility; he said (1): "Witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page." I may add that, after it became usual to have the printed transcript of the evidence in place of the judge's notes, it was argued in at least one case that, having the verbatim transcript of the evidence, the matter was more at large for the appellate court, but it is undoubted that the principle has not been relaxed—if, indeed, it has not been tightened—by the later decisions. I am aware that this contention was put forward in 1911 in *Kilpatrick v. Dunlop* (2). In reference to this contention Lord Halsbury said (3): "I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he has done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it has not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the judge had who had to determine the question of fact, and to determine which story to believe." In other words, whereas you might formerly find in the judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression is to be found in the cold, mechanical, record of the evidence.

As regards the third proposition that I have ventured to express, an illustration of it will be found in the decision of this House in *Hvalfangerselskapet Polaris A/S v. Unilever, Ltd.* (4), which is fully referred to by Lord Greene M.R. in *Yuill v. Yuill* (5), which also would appear to illustrate the same proposition. I do not pause to consider whether the decision of the First Division of the Court of Session in *Dunn v. Dunn's Trustees* (6) can be similarly justified, but I cannot accept Lord President Clyde's conclusion after a review of many of the

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(1) 1919 S. C. (H. L.) 35, 36.

(2) 1916 S. C. 631 n.

(3) Ibid. 632 n.

(4) (1933) 46 Ll. L. Rep. 29.

(5) [1945] P. 15, 20.

(6) 1930 S. C. 131.

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authorities. I think his expressed feeling (1) that he might "be underestimating the significance of the constant and "increasing insistence by the House of Lords on the 'privileges' "of the judge of first instance" was justified. Lord Clyde laid stress (2) on the dictum of Lord President Inglis in *Kinnell v. Peebles* (3), but, in my opinion, that dictum is not inconsistent with the decisions of this House, for the reasons stated by Lord Skerrington in *Maguire v. Charles McNeil, Ltd.* (4), to which Lord President Clyde does not refer in *Dunn's* case (5), although he took part in its decision.

My Lords, I am clearly of opinion that this present case falls under the second of my propositions, for I am satisfied, with all respect to my noble and learned friend on the woolsack, that I am not in a position, without enjoying the advantage of seeing and hearing the witnesses, of coming to a satisfactory conclusion on the printed evidence.

LORD MACMILLAN. My Lords, a court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct. But when a case involving such questions arises the court must do its best to judge dispassionately between the parties though it may sometimes be left with a doubt whether with the imperfect means at its disposal it has achieved perfect justice, especially where the evidence is widely conflicting. The case now before the House provides a typical example of the difficulties I have indicated but it is also a typical case for the application of the well established rule defining the proper approach of an appellate court to the consideration of a decision on fact by the court of first instance, a rule which, in my opinion, is of special force in matrimonial disputes. The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanor of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the

(1) 1930 S. C. 145.

(2) Ibid. 144.

(3) (1890) 17 R. 416, 423-4.

(4) 1922 S. C. 174, 189.

(5) 1930 S. C. 131.

atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong. But I need not pursue this topic which has been so fully expounded in many cases in this House and to-day again by my noble and learned friends who have preceded me. It is sufficient for me to say that, agreeing with Lord Thankerton in all that he has said, I do not find in the opinion of Lord Mackay, which embodies the views of the Second Division of the Court of Session or in the criticism to which the judgment of the Lord Ordinary was subjected at your Lordships' bar any adequate justification for reversing the decision which the Lord Ordinary reached. If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge.

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LORD SIMONDS. My Lords, from time to time this House has propounded the principles upon which an appellate court should review the findings of fact of a judge sitting without a jury, and, if I may respectfully say so, I am well content to accept what has fallen from both my learned and noble friends upon this matter. I would, in particular, say that I concur in the three propositions stated by my noble and learned friend, Lord Thankerton. In my opinion, whatever may be the correct way of stating the principle, the learned judges of the Second Division were not justified in taking a different view of the facts of this case from that taken by the Lord Ordinary.

My Lords, I must venture to say with all deference that they appear to me to have disregarded the principles laid down in this House for the guidance of courts of appellate jurisdiction, where the appeal is against a finding of fact by a lower court. Applying

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those principles to this case I am satisfied that an appellate court having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his. Nor do I find in the judgment of Lord Mackay any real appreciation of the weight that should be given to the trial judge's own estimate of the value of testimony. I suppose that if ever there was a class of case, in which an overwhelming advantage lies with the judge who has the witnesses before him, it is in the arena of connubial infelicity and discord. To me, as I read through those many pages of evidence, once and again the reflection occurred: would that I could have seen the witness and heard his voice as he said this or that. I do not think that with only the cold written word to guide me I should have come to a different conclusion from that of the Lord Ordinary. Much less do I think that there is any justification for doing so when he has enjoyed the important advantages denied to an appellate court.

There I should be content to leave this case but for certain criticisms made by counsel for the respondent in his able and candid address. Relying on the testimony of certain witnesses called on behalf of the respondent (whom I need not name) he said that the learned Lord Ordinary had come to a conclusion which was diametrically opposed to that testimony, yet he had not explicitly stated that he did not accept them as witnesses of truth nor indeed, made any adverse comment upon them. Your Lordships were therefore invited to find that the learned judge had forgotten or ignored this evidence and to hold that his judgment was thereby vitiated. I believe this to be fundamentally unsound criticism. The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration. If his conclusion is inconsistent with the evidence of certain of the witnesses but he does not, in terms, stigmatize them as false witnesses, it is not the proper or necessary inference that he has forgotten or ignored them; of this the present case is a cogent example, for I can well understand why the Lord Ordinary, while not accepting his evidence, did not think fit to comment unkindly on one at least of the witnesses in question. I concur in the motion that the appeal be allowed.

LORD DU PARCQ. My Lords, I was a party to the decision of the Court of Appeal in *Yuill v. Yuill* (1) to which my noble and learned friend on the woolsack has referred. I am happy that it should meet with approval in this House and I agree with my noble friend's statement of the result of earlier cases. All the authoritative decisions which relate to the proper attitude of an appellate court towards the findings of fact of the trial judge naturally tend to lay emphasis on one aspect of the question, either on the fact that the appellate court's duty to see justice done may constrain it to reject the judge's findings, or on the undesirability of deciding a case on a written record against the view of the judge who heard the witnesses. But, though one aspect may be emphasized, the other must always be present to the mind of the court. Thus, in *Yuill v. Yuill* (2), where the decision of the judge was reversed, Lord Greene M.R. said: "It can, of course, only be on the rarest occasions, "and in circumstances where the appellate court is convinced "by the plainest considerations, that it would be justified in "finding that the trial judge had formed a wrong opinion." My Lords, I am satisfied that this is not one of those very rare occasions. There are, no doubt, cases in which it is proper to say, after reading the printed record, that, after making allowance for possible exaggeration and giving full weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong. I can come to no such conclusion in the present case.

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Appeal allowed.

Solicitors for appellant: *Shaen, Roscoe & Co., for Bryson & Davie, S.S.C., Edinburgh, and McCash & Hunter, Perth.*

Solicitors for respondent: *Stoneham & Sons, for Simpson & Marwick W.S., Edinburgh.*

(1) [1945] P. 15.

(2) *Ibid.* 19.

parties to the appeal. The Court of Appeal dismissed the appeal on the short and preliminary ground that the parties, whose presence was required by the Civil Procedure Rules, were not before them. The question for the Board was whether that dismissal was justified. Before the year 1917 the appellant was the registered owner of an undivided one-quarter share in a number of plots in Haifa Village. In 1918, the respondents, or their predecessors in title, became the registered owners of the aforesaid quarter share of the appellant. The change of registration was effected in consequence of a sale purporting to be made by virtue of two powers of attorney given by the appellant under her signature to one Gad Hakim and bearing the date of June 19, 1914. They were not acted on until after the end of the war of 1914-1918. Those powers of attorney were made and authenticated in and before the Sharia (Religious) Court, Nazareth District. The appellant subsequently, that is to say, in 1920, gave or caused to be given notarial notices alleging that her signatures to those powers of attorney were forged, but she took no steps to set them aside. The respondents, or their predecessors in title, and the owners of the remaining three-quarter shares in the plots in due course proceeded to partition of their property. That was effected in the year 1929, and the respondents became the registered owners of plot 10875/7. Eleven years after, that is to say, on March 29, 1940, the appellant filed with the Settlement Officer, Haifa, a claim to a quarter share of parcels 3 to 7 inclusive and of parcels 18, 19, 21, 27, 29, 35, 36, 37, 47, 48 and 38, all in the same Block No. 10875 and therefore in the same vicinity as No. 7. The claimant supported the claim by production of the two powers of attorney and by alleging that they were forged. By the claim she objected to the partition. In accordance with Land Settlement of Title (Procedure) Rules competing claimants to the plots claimed by the appellant came forward. They included the respondents, whose claim was numbered 1391 and dealt with parcel No. 7. Seven other claims competing with the appellant's claim were lodged by other persons in respect of seven parcels additional to No. 7. The respondents and those other persons were constituted either defendants or third parties by the Settlement Officer empowered by s. 10 of Ordinance 80 (Land (Settlement of Title)) to hear and decide on such disputed claims to land in his area. The matter was heard before the Settlement Officer and a number of parties other than the appellant and respondents appeared and were repre-

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sented. In the course of the proceedings the appellant continued to allege that the powers of attorney were forged and to insist on her claim against the respondents, but took a course as to certain other parcels stated by the Settlement Officer as follows: "At the trial of the claims the plaintiff withdrew her claim to parcels 3, 19 and 21 and was furthermore prepared to accept the parcellation of the properties which her co-owners had been instrumental in securing and was willing to accept parcel 7 in whole in lieu of the undivided one-quarter share claimed in all the parcels in which she had not unconditionally withdrawn her claim, provided that the acceptance of this parcellation did not imply her acquiescence in the transaction." It was to be observed that that curious and conditional withdrawal of claims in effect disputed the very root of title to all the partitioned properties in dispute—namely, the powers of attorney by reason of which the defendants became registered and were able to effect or join in effecting the partition—but at the same time proceeded to claim parcel No. 7 which only came into undivided ownership by reason of the partition. It was not, therefore, surprising to find that the Settlement Officer, when passing his final decision on the matter between the appellant and the respondents in favour of the latter, expressly stated that his decision was given without prejudice to the conflicting claims of the defendants and third parties which remained to be decided. He passed no decision and made no formal order dismissing any party from the proceedings.

With regard to the allegation of forgery raised in respect of the powers of attorney the Settlement Officer recited that the appellant had served the notarial notice in 1920 but took no action to have the respondents' title vacated though she instituted actions in the courts for other properties that had been transferred in similar circumstances, namely, under powers of attorney challenged as forgeries, but those actions were never carried by the appellant to a decision on the issue of forgery. The Settlement Officer then proceeded as follows: "The plaintiff now comes to the Land Settlement Officer and asks him to inquire into the genuineness of the powers of attorney which were executed before the competent authority twenty-seven years ago, and nearly twenty years after the notarial notice to the fifth defendant and the registrar of lands. He is asked to do this by reason of the proviso to s. 10, sub-s. 3, of the Land (Settlement of Title) Ordinance,

“ cap. 80, which requires him to have regard to equitable as well
“ as legal rights to land in deciding questions of disputed
“ ownership or possession. This I must decline to do and
“ find support for my decision in r. 13 of the Land Settlement
“ of Title (Procedure) Rules which empowers a Settlement
“ Officer to inquire into the authenticity of documents not
“ authenticated before the court, notary public or similar
“ authority.

“ Where documents are authenticated by a competent
“ authority and their authenticity is challenged the complainant
“ must go and seek her remedy from that authority or one
“ superior to it, and the Land Settlement Officer has no
“ authority to inquire into the authenticity of the document
“ or vary its contents even if he thought it equitable to do so.
“ The only question for me to decide is whether the plaintiff
“ should be granted time in which to prove the forgery she
“ alleges. In this instance the powers were executed twenty-
“ seven years ago, and were acted on twenty-three years ago
“ and the plaintiff was aware of this not less than twenty years
“ ago when she served her notarial notice. Since then she has
“ instituted proceedings in the courts and these powers have
“ been before the courts during proceedings that extended
“ over a period of from eight to ten years. The question of
“ title has been examined and decided against her and I find
“ she has had ample opportunity to prove the allegation of
“ fraud.

“ After considering this lapse of time and the opportunities
“ the plaintiff has had to prove her allegations I find it would
“ be unjust to permit her to harass and pursue the defendants
“ through the courts and put them to the inconveniences and
“ expenses of continued litigation. I therefore dismiss plain-
“ tiff's claim to ownership based on the original registrations
“ in her favour and leave her to prove her claim by possession
“ adverse to the present registered owners.”

Later the appellant failed also in her claim to a title based on
possession.

This appeal was then brought and was dismissed by the
Supreme Court on the preliminary ground that the appellant
had failed to comply with r. 313 of the Civil Procedure Rules,
which was in the following terms : “ An appeal shall be lodged by
“ filing a notice of appeal in the registry of the court to which
“ the appeal lies, and all parties to the original action other
“ than the appellant shall be made respondents to the appeal.”

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The Court of Appeal (Trusted C.J., Copland and Rose JJ.) held that the words "the original action" mentioned in the rule covered and applied to the claim and proceedings before the Settlement Officer. It was also held that what had passed before the Settlement Officer without any actual dismissal of those other parties in no way made them cease to be parties. In consequence the preliminary objection was upheld and the appeal dismissed.

1947. June 10, 11. *Leonard Stein* for the appellant. The short point is whether the appellant complied with the requirements of r. 313 of the Civil Procedure Rules, 1938, and particularly with the requirement that all parties other than the appellant shall be made respondents to the appeal. The respondents to the present appeal were the only persons made respondents to the appeal in the Supreme Court. Rule 313 is not capable of being applied to appeals of this nature, because it requires a notice of appeal to be given, and in the form laid down in r. 314, which requires a notice of appeal to contain the name of the court which gave the decree or order appealed from, and so on. There is authority in the Palestine courts that the Settlement Officer is not a court and his decisions are not decrees or orders within the meaning of the Civil Procedure Rules, and, therefore, compliance with r. 313 is, on the face of it, impossible. *Rutman v. Khalil and Others* (1), as it stands, is a decision that the Settlement Officer is not a court—that case is under appeal to the Privy Council. It is also submitted on art. 38 of the Palestine Order in Council, 1922, that the Settlement Officer could not be given the jurisdiction or status of a court. In any event, on the hypothesis that r. 313 is applicable, its requirements were satisfied, since, on the true construction of the rule in relation to the facts of this case, the respondents were the only parties to the original action other than the appellant. There is nothing conclusive about the number of names at the head of the Settlement Officer's decision: they are not regular proceedings in a court of law, and are meant to be more or less informal, and a strong inference ought not to be drawn from the way in which they are headed. The way the case turned out was in respect of one particular parcel of land, No. 7, in which the only persons interested as against the appellant were the respondents to this appeal—the Khourys. The only result, if the appellant succeeded, would be that she

(1) (1943) 10 Pal. L. R. 407, 411-2.

would be substituted for the Khourys in respect of parcel 7. It is, therefore, wrong to say that all those other people, who had no interest whatever, were parties to the original action, and that the appellant should be defeated in limine because she did not serve an ineffectual notice. Each parcel in land settlement proceedings is the subject of a separate claim, and if there are conflicting claims each is the subject of a separate dispute : s. 27 of the Land (Settlement of Title) Ordinance, c. 80. Quite rightly, the original actions were heard together, but that did not make the parties in each parties to all—they remained separate disputes about separate titles. Further, the question is not who were the parties when the proceedings began, but who they were at the time of the judgment appealed against. The Settlement Officer was in error in holding that he was precluded by r. 13 of the Settlement of Title (Procedure) Rules from inquiring into the authenticity of the powers of attorney alleged by the appellant to be forgeries. In a dispute turning on their authenticity the Settlement Officer was under a duty to investigate the appellant's allegation. Lastly, it is not clear, if there was a period of prescription applicable, that it had expired against the appellant ; further, this is not a question of bringing an action, and according to the authorities the right would not be extinguished even if the period of limitation had expired.

Quass for the respondents. The Supreme Court were right on the technical point. If the Board come to the conclusion that they were wrong the matter would have to go back to the Supreme Court for the respondents to be given an opportunity of raising a large number of points in justification of the decision of the Settlement Officer. This was a registered title, which has in fact been considered by the courts since it was put on the register, and it is against that background that the position of the Settlement Officer should be reviewed. The Board are not concerned to deal with r. 13 of the Settlement of Title (Procedure) Rules : these powers of attorney were produced against the respondents—they did not produce them—and r. 13 has no application, and it is unnecessary for the Board to give any final decision on that rule. Undoubtedly the appellant could have taken steps to have these powers of attorney set aside if there were any truth in her allegations, but in these proceedings the respondents were registered title holders, and had been so for all those years, and plainly prescription helped them. They were in possession since 1917.

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The view of the appellant that r. 313 of the Civil Procedure Rules did not apply is untenable. The Supreme Court of Palestine have consistently assumed, or taken it for granted, that r. 313 does apply to appeals from Settlement Officers: *El-Hindi and Others v. Jewish Colonization Association* (1); *Heirs of Muhammad Qaddura v. Qaddura and Others* (2); *El Musa and Others v. Keren Kayemeth Leisrael, Ltd. and Another* (3). The Supreme Court may be wrong, but it is a matter of practice, and the Board will be slow to interfere with a settled practice of that nature. It was next said for the appellant that the Settlement Officer does not constitute a court, and *Rutman v. Khalil and Others* (4) was cited. Under s. 10 of the Land (Settlement of Title) Ordinance the Settlement Officer acts in a judicial capacity. So, here, you have the Settlement Officer holding a judicial proceeding; he is given judicial functions and hears an action, decides disputes in the action, and awards costs. It may be that he is not a court, but it is difficult to describe him as being otherwise.

[He was stopped.]

Leonard Stein replied.

July 24. The judgment of their Lordships was delivered by Mr. JAMES STRATFORD, who stated the facts set out above and continued: Their Lordships are of opinion that the decision of the Court of Appeal was correct. It was argued that r. 313 did not apply to proceedings before the Settlement Officer for a variety of reasons, including the contention that those proceedings were not an action. Their Lordships are clearly of opinion that r. 313 and the rules connected therewith did apply to appeals from a Settlement Officer and that the reasons assigned for a contrary opinion are without foundation. It follows that their Lordships will humbly advise His Majesty that this appeal should be dismissed. But their Lordships feel constrained, having regard to the very full argument that was addressed to them, to make some further observations. The Chief Justice, after giving the decision of the Court of Appeal, added "That is, of course, in some respects an unsatisfactory result. At the same time, we do not feel that in this particular case it is likely to result in any injustice." Their Lordships agree that it is as a rule unsatisfactory, if it can be avoided, to dispose of a matter on a technicality. But they agree even

(1) (1944) 11 Pal. L. R. 608.

(3) (1943) 10 Pal. L. R. 500.

(2) (1944) 11 Pal. L. R. 487.

(4) (1943) 10 Pal. L. R. 407.

more unreservedly that in this case no injustice resulted. They are of that opinion not merely because of the appellant's dilatory conduct, but also because, after the full argument on the point addressed to them, they are satisfied that the judgment of the Settlement Officer was right in respect of his incompetence to adjudicate on the alleged forgeries.

It is to be observed that under r. 333 of the Procedure Rules adequate provision is made for the curing of defects consisting in the non-fulfilment of conditions precedent to the hearing of an appeal. No application whatsoever was made to the Court of Appeal to exercise this power of amendment. Had it been made and good cause shown within the meaning of the rule their Lordships cannot doubt but that leave to put matters right would have been granted. Their Lordships would also observe in reference to the decision of the Court of Appeal that, in addition to the reasons assigned in the judgment of the court, there is a further reason which appears to their Lordships to be substantial. The appeal sought to raise a matter going to the root of the title of all the parties to the original proceedings. It seems to be obvious that a decision favourable to the appellant on the forgery issue would, of necessity, have a practical effect on the titles of owners of plots contiguous to No. 7 and dependent on the like root of title, as, for example, by reducing their status to that of possessory titles. If, having been cited, such parties felt uninterested and cared to rely on the conditional oral statement in their favour before the Settlement Officer no harm would have been done. They were entitled to be cited and they were not so cited, and that is more than a technicality.

Their Lordships propose now to state briefly their view of the substantial matter of his jurisdiction dealt with by the Settlement Officer. That does not depend wholly, or even mainly, on r. 13 of the Land Settlement of Title (Procedure) Rules, and the Settlement Officer did not say that it did so depend. He said that he found support for his decision in r. 13 and so do their Lordships. Rule 13 provides as follows: "13. (1.) The
" person against whom a document, other than a document
" authenticated before the court, notary public or similar
" authority, is produced, including the heirs or assigns of the
" alleged author of the document, may be called upon either to
" acknowledge or to deny the signature or seal and the hand-
" writing of the author of the document; silence on the part of
" the alleged author, or a profession of ignorance on behalf of

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"the heirs or the assigns, shall be regarded as an acknowledgment. (2.) If a person by whom the document purports to have been executed denies his signature, seal or handwriting, or if the heirs or assigns of such person deny their knowledge of the same, the Settlement Officer shall proceed to verify and compare the seal, signature or handwriting either himself or by the appointment of an expert or experts as he deems fit. (3.) The person denying the handwriting shall produce, if required, specimens of his handwriting and, subject to any order as to the costs of the case made by the Settlement Officer, shall pay the fee of the expert or experts."

It was said at one stage of the argument that r. 13 was not apt to cover a case such as this because the appellant and not the respondent had produced this document. Their Lordships do not agree with this view of the facts, but this point is really immaterial. Rule 13 clearly recognizes that there is removed from the jurisdiction of the Settlement Officer competence to deal with documents authenticated before a court. This is a clear provision, it may be *ex abundanti cautela*, that where, as here, the proceedings of a court are in question they can only be reviewed or disturbed by a court of equal or superior jurisdiction. This principle is well recognized by the courts of Palestine, see *Rutman v. Khalil and Others* (1). That decision related to the setting aside of a judgment, but the same principle applies to the setting aside of an act solemnly done, as was the execution of these powers of attorney, in and under the authentication of a court. That is the principle which is recognized and safeguarded by r. 13. The Settlement Officer's jurisdiction is a strictly limited one and extends to the limits laid down in the Ordinance and no further. Competence and power to undo what has been done by courts properly so called, of which he is not one, are not within those limits. It follows from this conclusion that in their Lordships' opinion no injustice at all has been suffered by the appellant by reason of her appeal to the Court of Appeal in Palestine having been dismissed sooner rather than later.

The advice which their Lordships will humbly tender to His Majesty is that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant : *Herbert Oppenheimer & Co.*

Solicitors for respondents : *T. L. Wilson & Co.*

(1) (1943) 10 Pal. L. R. 407.

Referred to. A.-G. FOR
SASKATCHEWAN. A.-G.
FOR CANADA.
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[PRIVY COUNCIL]

ATTORNEY-GENERAL FOR ALBERTA APPELLANT;
AND
ATTORNEY - GENERAL FOR CANADA
AND ANOTHER RESPONDENTS.
[AND CONNECTED APPEAL]

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ON APPEAL FROM THE SUPREME COURT OF ALBERTA
(APPELLATE DIVISION).

Canada — Alberta — Social credit legislation — Constitutional validity — Expansion of credit by loans — "Banking" — Ultra vires — Severability — Alberta Bill of Rights Act, S. A. 1946, c. 11 — British North America Act, 1867 (30 & 31 Vict., c. 3), s. 91 (15); s. 92 (13).

Part I of The Alberta Bill of Rights Act, 1946, enumerated and declared certain rights of Alberta citizenship, including the right to the opportunity to engage in gainful employment, or, if that was not available, to a social security pension, and to receive the necessities of life adequate to ensure health and physical well-being, educational and medical benefits and retirement pensions. In Part II the Act set up machinery for expressing in monetary terms the natural, economic and human wealth and resources of the Province, and for utilizing credit deposits resulting therefrom in payment of the social security pensions and other benefits specified in Part I. Provision was made in Part II for the licensing by a Board of Credit Commissioners of all credit institutions, which admittedly included chartered banks, carrying on business within the Province, and for issuing to them Alberta Credit Certificates against which such institutions were to issue to customers, or create in their favour, "credit deposits" over and above the deposits against which a reserve of currency was held; for the transfer of customers' credit deposits; and generally for regulating the creation, expansion and contraction of, as well as all dealing in, credit where such credit was not based on a reserve of currency of an equivalent value, and for that purpose compulsorily to recruit the services and facilities of existing credit institutions.

Held, that it is not beyond the business covered by the word "banking" to make loans which involve an expansion of credit, and accordingly Part II of the Act, which aimed at restricting and controlling that practice, was in pith and substance legislation relating to "banking," a subject-matter within the exclusive legislative competence of the Parliament of Canada under head 15 of s. 91 of the British North America Act, 1867, and, accordingly,

* *Present*: VISCOUNT SIMON, LORD MACMILLAN, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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beyond the powers of the Provincial legislature to enact. Further, Part I of the Act was not severable; the whole Act hung together, and Part II being ultra vires there was nothing left which would have any effective operation and the whole Act was therefore invalid.

Tennant v. Union Bank of Canada [1894] A. C. 31, at p. 46, and *Attorney-General for Canada v. Attorney-General for Quebec* ante p. 33, referred to.

Judgment of the Supreme Court of Alberta (Appellate Division) affirmed in part and reversed in part.

APPEAL and CROSS-APPEAL (consolidated) (No. 22 of 1947) from a judgment of the Supreme Court of Alberta (Appellate Division) (December 17, 1946), on a reference to it by the Lieutenant-Governor in Council of the following question: "Is the Alberta Bill of Rights Act, S. A. 1946, c. 11, intra vires the legislature of Alberta, either in whole or in part, and if so, in what part or parts, and to what extent?"

Part I of the impugned Act declared certain existing rights of Alberta citizenship and the right of every citizen to gainful employment or, if such employment was not available, to a social security pension, and to educational, medical and retirement benefits, and Part II provided a method of making effective the provisions of Part I by conferring on the Province control over the creation of credit by chartered banks and other credit institutions over and above their cash reserves.

The relevant provisions of the impugned Act appear from the judgment of the Judicial Committee.

The Supreme Court of Alberta (Harvey C.J.A., Ford, O'Connor, Macdonald and Parlee J.J.A.) held that Part II of the Act was ultra vires, and Part I intra vires, the legislature of Alberta.

The cross-appeal was by the Attorney-General for Canada against the decision that Part I of the Act was intra vires.

1947. June 23, 24, 26. *Lucien Maynard K.C.* (Attorney-General for Alberta) and *H. J. Wilson K.C.* (Deputy Attorney-General for Alberta) for the Attorney-General for Alberta. The first question is whether the Province has the constitutional authority to establish the rights of citizenship in the manner provided in Part I of the impugned Act. Part II provides the method—and not necessarily the only one—of making effective the provisions of Part I. That method is the exercise by the Province of the control over the creation of credit by

the chartered banks and other credit institutions over and above their cash reserves. The second question, therefore, is whether the Province has the constitutional authority to enact the provisions of Part II. The respondents claim that the power to expand credit over and above cash reserves is properly a matter exclusively reserved to the Dominion by virtue of its authority to legislate on matters relating to "banking" and allied matters. The appellant, on the other hand, submits that Part II does not deal with "banking" within the meaning of that word as used in the British North America Act at the time of confederation, and that consequently the control of the issue and creation of credit by the chartered banks over and above their cash reserves is within the legislative competence of the Province. [Reference was made to the Report of the Royal Commission on Canadian Banking, 1933 (the Macmillan Report), pp. 43 and 44.] While it is conceded that banks deal with credit as part of ordinary banking operations, it is contended that the practice which the banks have assumed of expanding credit over and above their cash reserves did not constitute the practice at the time of confederation, is not banking practice within the meaning of that word in the British North America Act, and is not in conflict with any provision of the Dominion Bank Act, and that consequently there is a field reserved to the Provinces under the general heading of "property and civil rights," and the Province may legislate in regard to this field even though it affects banking operations. That is the broad submission. The appellant must first bring himself within s. 92 of the Constitution Act, and he must also show that the Act in question does not relate to "banking" and that it does not infringe on any other sub-head of s. 91.

"Credit" extends far beyond the legitimate province of banking; jurisdiction in regard to credit is inseparable from jurisdiction over "property and civil rights," and jurisdiction over credit is neither exclusively nor by necessary implication reserved to the Parliament of Canada in the Act of 1867. The financial credit of the Province is the ability and intention of the people to produce goods and services. [The history of banking was dealt with to show the relationship which existed between credit and banking, and reference was made to the practice at the time of confederation, and to Breckenridge, Canadian Banking System, p. 243, and to Curtis on Statistical Contributions to Canadian Economic History—Statistics of Banking.] The foregoing establish that at the time of con-

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federation banks had not then assumed the practice of expanding credit as they are doing to-day : *Goodwin v. Robarts* (1). It is a function which cannot be recognized as coming within the field of Dominion legislation. Although banking is properly a dealing in credit, it cannot be said that all dealing in credit is banking—that is the crux of the argument. There must be a dividing line, and it is submitted that the fundamental difference to be recognized by the court is as follows : To the extent that a person (a) issues notes or bills under the statutory authority of Parliament and such issue is based entirely on his credit, that is, the confidence of the public in his ability to redeem these notes on demand in legal tender ; and (b) lends the notes so issued as well as any currency under statutory authority to the public on the strength of credit, that is, the confidence he has in the capacity, ability and integrity of the public to repay its loans ; and (c) issues notes or bills under statutory authority which are universally accepted as a medium of exchange or money ; he is a dealer in credit within the meaning of banking as defined in the British North America Act. To the extent that a person (a) advances credit to an individual by supplying him with goods to be paid for in the future ; and (b) keeps a record of credit advances in his books of account ; and (c) uses his own credit, that is, the confidence placed in him by the public and bankers, to borrow and lend ; and (d) keeps a written record of the transactions of the public on the strength of his credit, that is, the confidence or trust the public has in him to keep the records correctly and honestly ; and (e) extends credit which is transferable and can be used by means of a cheque, that is, the confidence of the public in the maker of the cheque, and which is not universally accepted and cannot be said to be a medium of exchange, money or currency ; does all or any of these things and does not issue notes intended to circulate as money, he is not dealing in credit within the meaning of the term banking as used in the British North America Act. The term “ banking ” as used in s. 91, head (15.) of that Act should not be given a more extended meaning than that which it had at the passing of the Act : *Rex v. Cotton* (2). It then had a definite and specific meaning, and the Dominion Parliament could not legislate with respect to matters not ordinarily included in the term banking at that time—which did not include expanding credit—and those matters would

(1) (1875) L. R. 10 Ex. 337, (2) (1912) 45 S. C. R. (Can.) 348, 350-1.

469, 508.

otherwise be included under the head "property and civil rights" and within the jurisdiction of the provincial legislatures. [On the construction of statutes reference was made to Craies on Statute Law, 4th ed., pp. 83-4.] To carry out the responsibilities imposed on them by the British North America Act the Provinces must have the constitutional authority to use the credit of the people of the Provinces, otherwise the Provinces are saddled with responsibilities which they cannot discharge; any other interpretation of the Constitution Act would lead to an absurdity. Lastly, the argument as to the restricted meaning of "banking" is supported by reference to an analogous situation in respect of the interpretation of the words "regulation of trade and commerce"—it has been held in many cases that those words in s. 91, head (2.) should be given a restricted meaning, because to give them their literal meaning would give the Dominion Parliament wide powers which were not intended by the framers of the Constitution Act: *Citizens Insurance Company of Canada v. Parsons* (1); *In re The Board of Commerce Act, 1919* (2). The Alberta Bill of Rights Act is not banking legislation.

H. J. Wilson K.C. followed. The judgment below of the Supreme Court stated that "it has been repeatedly held that "while the Dominion in legislating on subject-matters assigned "to it may infringe on subject-matters assigned to the "Provinces the converse is quite otherwise, and that the right "of the Provinces, though stated to be exclusive, is qualified, "and that provincial legislation though on a subject-matter "assigned to the Provinces cannot be permitted to infringe on "subject-matters assigned to the Dominion." It is that converse proposition which is in error; it is submitted that if provincial legislation is in pith and substance on a provincial subject-matter it is valid notwithstanding that it infringes on a Dominion matter. If the impugned Act relates to "property "and civil rights" it may incidentally affect or infringe on a Dominion subject-matter without being invalid provincial legislation. Authorities which bear out that proposition are *Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame de Bonsecours* (3), *Attorney-General for Manitoba v. Manitoba Licence Holders' Association* (4) and *Lymburn v. Mayland* (5). The two following cases show the extent to

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(1) [1881] 7 App. Cas. 96.

(4) [1902] A. C. 73.

(2) [1922] 1 A. C. 191.

(5) [1932] A. C. 318, 324.

(3) [1899] A. C. 367.

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which a Province may affect or infringe on a Dominion matter if the provincial legislation falls within s. 92: *Ladore v. Bennett* (1), *Day v. Victoria (City)* (2). [Reference was also made to *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters and Another* (3), *Attorney-General for Alberta v. Attorney-General for Canada* (4) and *Attorney-General for Canada v. Attorney-General for Quebec and Others* (5).] If the impugned Act is banking legislation, or if it is in conflict with valid Dominion legislation, the appellant cannot succeed. It is submitted, however, relying on the principles in the cases cited, that the Act, relating as it does to the control and regulation of credit and not specifically directed to banking or banks or any of the subjects assigned exclusively to the Dominion, although it may incidentally affect banks and the issue of credit by banks, in pith and substance relates to "property and civil rights" and is within the competence of the provincial legislature.

G. H. Steer K.C. and *D. W. Mundell*, for the Attorney-General for Canada, were only required to deal with the cross-appeal. Part I of the Act is not severable from, but on the contrary is wholly dependent on, Part II. The court cannot presume, nor is there evidence, that the legislature intended to pass Part II of the Act alone. On the contrary, there is such a necessary connexion between Part I and Part II as to furnish cogent evidence that the legislature did not intend to enact one part without the other. Section 28 of the Act also furnishes evidence that the legislature intended that the Act should come into force as a whole or not at all. [Reference was made on the point of severability to *Attorney-General for Manitoba v. Attorney-General for Canada* (6), *In re Validity of Manitoba Act* (7), *Attorney-General for Canada v. Attorney-General for Ontario* (8) and *Attorney-General for British Columbia v. Attorney-General for Canada* (9).] The preamble of the impugned Act is intended to be read as explanatory of the whole Act, and it shows, as does s. 28, that the Act was intended to stand as a whole. There is nothing in the Act which would justify the Government of Alberta in paying social security pensions in any other form than this new form of money which

(1) [1939] A. C. 468, 480.

(2) (1938) 3 W. W. R. 161, 184.

(3) [1940] A. C. 513, 532.

(4) [1943] A. C. 356, 369.

(5) Ante pp. 33, 43.

(6) [1925] A. C. 561, 568.

(7) [1924] S. C. R. (Can.) 317, 323.

(8) [1937] A. C. 355, 367.

(9) [1937] A. C. 377, 389.

is set up—the credit system. One cannot conceive of the legislature passing Part I of the Act unless they had also passed Part II which provides the means of payment.

E. J. Chambers K.C. for the Canadian Bankers' Association, the second respondents to the main appeal, said that they were not a party to the cross-appeal.

Lucien Maynard K.C. Part I of the Act is clearly within the legislative competence of the provincial legislature, relating, as it does, to property and civil rights, and it is severable from Part II. There are two points on severability; first, whether Part I forms an inextricable part of the Act as a whole; it does not; it is not so inextricably interwoven with Part II that it cannot stand by itself as a separate enactment. Secondly, the Board cannot assume that if Part II is invalid the legislature would not have passed Part I in itself. The wisdom of the legislature in passing any enactment should not be passed on so long as the enactment was within the competence of the legislature. The pith and substance of this legislation is to provide the people of the Province with increased social services. [Reference was made to *Attorney-General for British Columbia v. Attorney-General for Canada* (1) and *Toronto Corporation v. York Corporation* (2).]

There was no reply.

July 24. The judgment of their Lordships was delivered by VISCOUNT SIMON. In this matter consolidated appeals by the Attorney-General for Alberta and the Attorney-General for Canada respectively are brought before the Board from a judgment of the Supreme Court of Alberta (Appellate Division) to which, by the order of the Lieutenant-Governor in Council of Alberta, the question of the validity of "The Alberta Bill of Rights Act" (c. 11 of 1946) had been referred. The Supreme Court decided that Part II of the Act was invalid inasmuch as the Alberta legislature had no power to make a law in relation to the subject of "banking," which is part of head 15 of the enumerated classes of subjects which s. 91 of the British North America Act exclusively assigned to the Parliament of Canada. The Supreme Court also held that Part I of the Act was *intra vires* of the Alberta legislature and did not pronounce that the Act was invalid as a whole. The reasons for the judgment of the Supreme Court of Alberta were given by Harvey C.J.A., and were concurred in unanimously by the rest of the court

(1) [1937] A. C. 377.

(2) [1938] A. C. 415.

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which consisted of Ford J.A., O'Connor J.A., Macdonald J.A. and Parlee J.A.

The Attorney-General for Alberta contended before the Board that Part II was not legislation relating to "banking" within the meaning of head 15 of s. 91, but was in pith and substance legislation relating to "Property and civil rights in the "Province" (head 13 of s. 92). The Attorney-General for Canada contended that the decision of the Supreme Court of Alberta that Part II of the Act was invalid was correct and should be upheld, while in the cross-appeal he urged that the rest of the Act was not severable from Part II with the result that the whole Act was invalid. The Canadian Bankers' Association, which was the second respondent in the appeal of the Attorney-General for Alberta, appeared before their Lordships to assist in upholding the decision of the Supreme Court as to Part II of the Act.

Their Lordships have therefore two questions before them, first, as to the validity of Part II of the Act, and, secondly, if Part II is held to be invalid, whether Part I of the Act none the less survives as severable and effective legislation. Their Lordships will deal with these two questions in turn. It is first necessary to set out the relevant parts of the Act, both for the purpose of reaching a conclusion as to the validity of Part II and for the purpose of seeing whether the rest of the Act can stand if Part II goes. The Act begins with a long preamble which is preliminary to the division into two parts. The preamble is composed of seven paragraphs, the first three of which make reference to the purposes for which the two world wars were fought and to the duty which now rests on the Canadian people "to win the peace by so ordering their internal "economy that the freedom and security for which they fought "may be experienced in reality by all of our citizens." The fourth recital runs as follows: "Whereas the Province of "Alberta possesses all the human and material resources "necessary to provide for its citizens the material security "essential to the enjoyment of personal freedom." The fifth recital is: "Whereas The British North America Act imposes "upon the Province the constitutional responsibility of providing its citizens with an opportunity to realize and enjoy "their property and civil rights." The sixth and seventh recitals are of considerable importance as indicating the main purposes of the Act and as bearing on the connexion between Part I and Part II. They run as follows: "Whereas

“ the discharge of the Province’s responsibility necessitates
 “ the recognition of certain basic rights and responsibilities
 “ of citizenship and requires that its citizens have the necessary
 “ access to their resources so that they may produce the goods
 “ and services they require and provide for their equitable
 “ distribution in a manner that will ensure to all an opportunity
 “ to obtain social and economic security with personal freedom ;
 “ and Whereas the control of policy with respect to the issue,
 “ use and withdrawal of credit primarily determines the extent
 “ to which the citizens of Alberta may develop and enjoy the
 “ use of their resources and therefore must be a function of the
 “ electorate of the Province to be discharged on their behalf by
 “ their democratically elected representatives.” Their Lord-
 ships would observe, before going further, that the sixth recital
 asserts the necessity of two things which are united by the
 conjunction “ and.” It will be seen hereafter that the first of
 these elements is to a large extent the substance of Part I,
 while the second of them is sought to be dealt with in Part II.
 The final recital will be found to express the effective purpose of
 the Bill which, when it is read as a whole, seems plainly to be an
 application of the economic theory of what is called social
 credit.

The preamble is followed, in s. 2, by a number of definitions,
 one of which, namely, the definition of “ social security pension ”
 is of special importance. Their Lordships would again observe
 that these definitions precede any division of the Act into parts.
 The definition referred to is as follows: “ 2.—(f) ‘ Social
 “ ‘ Security Pension ’ means the payment to individuals,
 “ as herein provided, of claims on goods and services within
 “ the limitations of the natural resources of the Province and
 “ the productive capacity of the people, to ensure an annual
 “ income of not less than six hundred dollars a year on the
 “ basis of the 1945 price level for every single citizen of Alberta
 “ nineteen years of age and over.

“ Provided, however, that in the case of married persons, for
 “ the purpose of determining the amount of the payment to
 “ either spouse, the income of the two spouses shall be con-
 “ sidered as if it were their joint income.”

Then comes Part I, which consists of twelve sections, the first
 ten of which are all introduced by the words “ it is hereby
 “ declared.” Sections 3 to 8 appear to be mere declarations of
 common law rights. The language employed might, perhaps,
 raise questions as to their precise application—for example

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how does s. 7 apply to the case where a man's property is requisitioned or acquired on compensation terms for a public work or railway? But it is unnecessary to delay over these sections since nobody can suppose that the purpose of the Alberta legislature in passing this legislation would justify the view that they would intend these sections to stand if the clauses which carried out the main purpose of the Bill had to be regarded as a nullity. There follow in Part I, ss. 9 to 12, which must be set out:

" 9. It is hereby declared that every citizen of Alberta of
" not less than nineteen years of age and not more than sixty
" years of age is entitled as a right of citizenship to—

" (a) the opportunity to engage in gainful employment ;
" or

" (b) if gainful employment is not available, to a social
" security pension.

" 10. It is hereby declared that every citizen of Alberta
" under nineteen years of age is entitled as a right of
" citizenship to

" (a) the necessities of life adequate to ensure health
" and physical well-being ;

" (b) educational benefits ;

" (c) medical benefits.

" 11. It is hereby declared that every citizen of Alberta
" who has reached the age of sixty years is entitled as a right
" of citizenship to retire from gainful employment and upon
" retirement to receive,

" (a) a pension of such amount as may from time to time
" be authorized by an Act of the legislature, provided that
" such pension shall not be less than the current amount
" of the social security pension ;

" (b) medical benefits.

" 12. It is hereby declared that every citizen of Alberta
" who becomes physically disabled and unable to engage in
" gainful employment is entitled to,

" (a) a social security pension ;

" (b) medical benefits."

Section 13 provides that in consideration of the foregoing rights of citizenship " it shall be the duty of every citizen of
" Alberta to discharge faithfully his responsibilities as an
" elector and citizen " to observe the law, respect the rights of
other citizens, and " to exercise his initiative and enterprise
" in promoting the spiritual, cultural and material welfare of

"the Province." There is nothing in the Act to indicate what is to happen to a citizen who does not do his duty in these respects. Lastly, in Part I, comes s. 14, according to which the Lieutenant-Governor in Council may make orders to define gainful employment, may enter into agreements with any other Province or with the Dominion for the purpose of carrying out the intent and purpose of this Act, and may make rules and regulations governing the determination of any question which may arise under Part I.

Part II of the Act, which has the heading "Constitution and Functions of Board of Credit Commissioners," consists of fourteen clauses, of which the first, s. 15, contains definitions. Of these the following must be specially noted :

"(a) 'Alberta Credit Certificates' means certificates issued to credit institutions authorizing a corresponding amount of credit deposits and issued in such form and in such denominations as the Board may specify for the purposes of carrying into effect the provisions of this Act.

"(d) 'Credit' means the monetary evaluation of the capacity of the people of the Province to produce and distribute goods and services as when and where required.

"(e) 'Credit deposits' means deposits of credit which have been made available to persons as claims on goods and services and in respect of which credit institutions have no corresponding reserve of currency.

"(f) 'Credit Institution' means any person, corporation or organization whose main business is dealing in credit by keeping accounts of customers' credit deposits, transferring credit deposits from the account of any customer to any other person, exchanging credit deposits for currency or making credit deposits available to customers ; but shall not include any person, corporation or organization whose main business is the production or distribution of goods or the rendering of any service to the public which is not concerned mainly or exclusively with dealing in credit deposits ; and likewise shall not include the Bank of Canada or credit unions operating pursuant to The Credit Union Act."

Their Lordships would observe that the definition of "credit institution" does not, in terms, include banks, but, while "credit institution" is a wider term, it is obvious (and is not disputed) that chartered banks are included, i.e., banks created

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by or under legislation of the Dominion, while the final words of the definition exclude the Bank of Canada.

Section 16 provides for the setting up of the Board of Credit Commissioners, and s. 17, sub-s. 1, purports to confer on the Board authority to license all credit institutions in the Province. There is nothing in the Act to suggest that the Board must license chartered banks operating within Alberta, and it follows that the enactment purports to confer on the Board the right to refuse such a licence. Sub-section 3 of s. 17 authorizes, on summary conviction, a penalty of not less than \$1,000 and not more than \$5,000 for each day that a credit institution which has not obtained a licence carries on its operations, and sub-s. 4 adds the additional consequence that the Board or its agents, with the approval of the Lieutenant-Governor in Council, "may enter the premises of such institution and "assume full control and management of its business on behalf "of its directors and shareholders." There follows a proviso which, in the view of their Lordships, is a proviso to sub-s. 4 alone. It runs as follows: "Provided, however, that nothing "herein contained shall be deemed to empower the Board to "take over or interfere with any operations which the credit "institution is authorized to perform by virtue of the provisions "of The Bank Act nor to impair in any way the deposits any "person may have with the credit institution, nor to interfere "with any such person in dealing with his deposits in any way "he may deem proper."

Section 18 requires the Board to establish what is called a capital assets account of Alberta, which is to include "an "estimated valuation of the economic resources of the "Province" as therein defined, and s. 19 requires the Board to establish a consolidated credit adjustment fund to which the Board shall issue credit deposits "in such amounts as may from "time to time be required as a reserve for providing an adequate "volume of credit deposits to finance the production and distribution of goods and services within the Province and for "maintaining a balance between the aggregate purchasing "power of the people of the Province and the estimated "collective prices of goods for sale within the Province and for "providing for their equitable distribution, having due regard "to all the factors involved." There follows s. 20, according to which the Board is to transfer to the general revenue account of the Province "such amounts of credit deposits and in such "manner as may be required" for the payment of social

security pensions and other benefits therein set out. Sub-section 2 of s. 20 must be set out verbatim. Its text is as follows: "For the purpose of effectively controlling and regulating the issue and withdrawal of credit deposits within the Province, the Board, with the approval of the Lieutenant-Governor in Council, shall issue to licensed credit institutions Alberta Credit Certificates in such amounts and on such terms as the Board may deem advisable in order to enable such credit institutions to issue credit deposits to customers over and above the deposits against which a reserve of currency is held, and the amount of Alberta Credit Certificates so issued shall be debited to the Consolidated Credit Adjustment Fund." Their Lordships call attention to the phrase, "licensed credit institutions" in this sub-section, as clearly indicating that the enactment purports to confer on a provincial authority power either to grant or to withhold the issue of credit certificates to any chartered bank and thus to restrain any bank from creating an expansion of credit by loans exceeding its reserve of currency.

Section 24 is of special importance, and, indeed, contains the essence of the scheme requiring the deposits of the banks to be backed to the extent of 100 per cent. by currency or by the proposed credit certificates. The section must be set out in full: "24.—(1.) Every licensed credit institution shall keep and operate the accounts of its customers, and arrange for the transfer of credit deposits from one account to another account in such manner and by such instruments as the Board may from time to time direct and the Board and its duly authorized agents shall at all times have access to the books, records and accounts of such credit institutions, and every member of the Board or its authorized agents having access to such records shall take and be bound by an oath of secrecy properly executed before a person authorized to administer oaths within the Province. (2.) The Board may require every licensed credit institution to hold against all or any credit deposits of customers, not being deposits against which a reserve of currency of an equivalent value is held, Alberta Credit Certificates of an aggregate value not exceeding the aggregate value of such credit deposits. (3.) In the case of any credit institution licensed to operate within the Province, having branches and operating outside the Province, the proportion of its reserves of currency to its total deposits within the Province shall be deemed to be in the same ratio

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" as its total reserves of currency to its total deposits in
" Canada. (4.) The Board may direct that any balance due
" by one credit institution to another credit institution on
" account of any transfers of credit deposits between their
" respective customers shall be settled by the transfer of Alberta
" Credit Certificates of a corresponding value."

Section 26 provides for severe penalties for breach of the provisions of Part II, including the cancellation of the licence of a credit institution, and, in the case of an individual other than a credit institution, a fine not exceeding \$1,000, or one year's imprisonment, or both. The final section of the Act runs as follows: " 28. This Act shall come into force on a day
" fixed for that purpose by Proclamation of the Lieutenant-
" Governor in Council, but no such Proclamation shall be made
" until after the question of the validity of this Act has been
" referred to the Supreme Court of Alberta pursuant to the
" provisions of The Constitutional Questions Act, and it is
" certified upon any such reference that this Act is valid, and if
" no appeal is for the time being pending, until the time for
" giving any notice of any such appeal has elapsed."

Such being the main contents of the Act, their Lordships proceed first to deal with the question of the validity of Part II. They are not, of course, called on to form, or to express, any opinion as to the economic thesis on which what is called social credit is based. Their duty is to examine the enactment itself, without considering what may be its economic merits or demerits, and to determine, in the first place, whether the Supreme Court of Alberta was right in holding that Part II is ultra vires the legislature of Alberta. It cannot be disputed that the object and effect of Part II are to interfere with and control the business carried on by a chartered bank in the Province by which (subject to any restrictions imposed by Dominion legislation) it makes loans to customers to a total amount which exceeds the liquid assets which the bank holds. The question, therefore, is whether operations of this sort fall within the connotation of " banking " as that word is used in s. 91 of the British North America Act. Their Lordships entertain no doubt that such operations are covered by the term " banking " in s. 91. The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act. To take what may seem a frivolous analogy, if " skating " was one of the matters to which the exclusive

legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature. Other illustrations may be drawn from s. 91 as it stands : take, for example, head 5, "Postal Services." In 1867 postal services in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of aeroplanes for carrying mail is, on that account, not within the phrase. The concept of banking certainly includes the granting of credit by banks ; "a banker," as Duff C.J. said in dealing with the *Alberta Legislation Reference* (1) "has been defined as 'a dealer in credit'." Whether the expansion of credit now effected by bankers' advances is regarded as wise or unwise, as just or unjust, as economically desirable or economically unjustifiable, does not, in the view of their Lordships, affect the point here at issue at all. If it is fairly included within the conception of "banking" it is a matter exclusively reserved for the legislature of Canada.

In the well-known decision of the Privy Council in *Tennant v. Union Bank of Canada* (2), Lord Watson laid it down that the head "banking" was an expression "wide enough to embrace every transaction coming within the legitimate business of a banker." He further said that, notwithstanding that "Property and civil rights" was a topic allocated to provincial legislatures under s. 92, "banking" was one of the matters concerning which the exclusive legislative authority of the Parliament of Canada could not be operated without interfering with and modifying civil rights in the Province. This view of the width of the expression "banking" has been recently confirmed by another decision of this Board, in *Attorney-General for Canada v. Attorney-General for Quebec* (3). Undoubtedly the business of banking has developed and expanded greatly since Confederation, though it is by no means clear that even before 1867 banks in Canada were not practising to a more limited extent the kind of operation which it is the object of the Alberta Act now under consideration to prevent or restrict. Harvey C.J. points out that as early as 1859 the legislature of the then Province of Canada was enacting (s. 1 of c. 55 of the Consolidated Statutes of that year) : "The

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(1) [1938] S. C. R. (Can.) 100.

(2) [1894] A. C. 31, 46.

(3) Ante p. 33.

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"business of banking shall, for the purposes of this Act, mean
"the making and issuing of Bank Notes, the dealing in gold
"and silver bullion and exchange, discounting of promissory
"notes, bills and negotiable securities, and such other trade
"as belongs legitimately to the business of banking." Moreover,
s. 85 of that Act provided that "the total liabilities of any
"Joint Stock Bank shall never exceed three times the amount
"of its capital"—a provision which sets some limit to bank
lending, but not a limit measured by the currency which the
bank holds. But in any event, it appears to their Lordships
to be impossible to hold that it is beyond the business covered
by the word "banking" to make loans which involve an
expansion of credit. Legislation which aims at restricting or
controlling this practice must be beyond the powers of a
provincial legislature. It is true, of course, that in one aspect
provincial legislation on this subject affects property and civil
rights, but if, as their Lordships hold to be the case, the "pith
"and substance" of the legislation is "banking" (the phrase
"pith and substance" can be traced back to Lord Watson's
judgment in *Union Colliery Company of British Columbia v.
Bryden* (1)), this is the aspect that matters and Part II is
beyond the powers of the Alberta legislature to enact.

There remains the second question, whether when Part II
has been struck out from the Act as invalid what is left should
be regarded as surviving, or whether, on the contrary, the
operation of cutting out Part II involves the consequence that
the whole Act is a dead letter. This sort of question arises not
infrequently and is often raised (as in the present instance)
by asking whether the legislation is *intra vires* "either in whole
"or in part," but this does not mean that when Part II is
declared invalid what remains of the Act is to be examined bit
by bit in order to determine whether the legislature would be
acting within its powers if it passed what remains. The real
question is whether what remains is so inextricably bound up
with the part declared invalid that what remains cannot
independently survive or, as it has sometimes been put,
whether on a fair review of the whole matter it can be assumed
that the legislature would have enacted what survives without
enacting the part that is *ultra vires* at all. Harvey C.J. dealt
with the second question very briefly and answered it by
merely saying that Part I is *intra vires*. Their Lordships,
as just explained, think that notwithstanding the form of the

question put, the matter cannot be disposed of so summarily.

Looking at the Act as a whole, it is clear that its intent and purpose is to establish machinery sufficiently complete in itself to secure that, in accordance with the economic concept of social credit, it will severely restrict chartered banks from continuing to carry on a legitimate part of their present operations. When Part II is cut out, what is left? In the first place, there is left the preamble, some of the later paragraphs of which would have little or no application to Part I standing alone. The sixth paragraph, as already pointed out, when reciting that the discharge of the Province's responsibilities necessitates an achievement of two results, is, as to the second suggested result, plainly pointing to Part II. Again, the definition of "social security pension," as meaning the payment to individuals "as herein provided," of claims on goods and services, etc., within the limitations there indicated, is anticipating and pointing to provisions in Part II, such as s. 15 (e) and s. 18, sub-s. 1. Their Lordships have already indicated that they cannot suppose that ss. 3 to 8 in Part I are other than preliminaries to what follows, and while it is true that ss. 9 to 12 include a declaration that citizens of Alberta in certain circumstances are entitled to social security pensions, these declarations remain mere aspirations unless Part II operates to provide how this is to be done. The Attorney-General for Alberta ingeniously argued that Part II was only one method of securing these results, and that Part I standing alone left it in the power of the Lieutenant-Governor in Council to make the necessary provisions "by order" in some other undefined and unascertained form; but, in their Lordships' opinion, this is not the scheme of the Act, nor do the words in s. 14 empower the Lieutenant-Governor in Council to make new machinery which will take the place of Part II. The whole thing hangs together, and if Part II goes there is nothing left to be added to the statute law of Alberta which would have any effective operation. The view which their Lordships have formed is confirmed by the language of s. 28, which shows that the Act cannot come into force unless "it is certified "that this Act is valid," etc. Since Part II is invalid, there cannot be a certificate that "this Act" is valid, and thus by the terms of the Act itself, the Act cannot ever come into force. For these reasons their Lordships do not find it possible to agree with the Supreme Court of Alberta that, when Part II has gone, there is yet some part of the Act which survives.

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Their Lordships will humbly advise His Majesty that Part II of the Act is ultra vires and that, having regard to the relation between Part II and the rest of the Act, the Act as a whole cannot be regarded as valid.

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Solicitors for the Attorney-General for Alberta: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for the Canadian Bankers' Association: *Lawrence Jones & Co.*

[HOUSE OF LORDS]

H. L. (E.)* NEWPORT BOROUGH COUNCIL . . . APPELLANTS ;

AND

MONMOUTHSHIRE COUNTY COUNCIL RESPONDENTS.

ET E CONTRA.

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Feb. 10, 11,
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Local government—County borough extension—County area reduced—Financial adjustment—General exchequer grant—Arbitration—Sum awarded on adjustment—Claim to interest—Local Government Act, 1929 (19 & 20 Geo. 5, c. 17), ss. 86, 108, sub-s. 1 (b)—Local Government Act, 1933 (23 & 24 Geo. 5, c. 43), s. 151, sub-s. 3, s. 152, sub-s. 1 (b) ; sch. 5, r. 1—Newport Extension Act, 1934 (24 & 25 Geo. 5, c. lvii.), s. 58.

The Newport Extension Act, 1934, extended the area of Newport Borough, correspondingly reducing that of the county of Monmouth, and under s. 58, sub-s. 1, of that Act, and s. 151, sub-s. 3, of the Local Government Act, 1933, certain consequential financial adjustments between them fell to be determined by an arbitrator. One of these matters was set out in s. 152, sub-s. 1 (b) to the Act of 1933: " Provision shall, unless otherwise agreed, be made for " the payment to a local authority of such sum as seems equitable " in accordance with the rules contained in sch. 5 to this Act, in " respect of any increase of burden which, as a consequence of " any alteration of boundaries . . . will properly be thrown on " the ratepayers of the area of that local authority in meeting the " cost incurred by that local authority in the discharge of their " functions." By r. 1 of sch. 5: " Regard shall be had to (a) the " difference between the burden on the ratepayers which will " properly be incurred by the local authority in meeting the cost " of executing any of their functions and the burden on the

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD SIMONDS, LORD DU PARCQ and LORD NORMAND.

"ratepayers which would properly have been incurred by the local authority in meeting such cost, had no alteration of boundaries or other change taken place; (b) the length of time which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. 1 of s. 108 of the Local Government Act, 1929, shall be taken into account." The county council of Monmouth was in receipt of an annual contribution by Parliament towards its expenses, called the general exchequer grant, provided for by s. 86 of the Act of 1929. Under s. 108, sub-s. 1 (b), of that Act, the Minister of Health, on the alteration of boundaries, reduced the sum received by the county in respect of the grant:—

Held (per Viscount Simon, Lord du Parc and Lord Normand, Lord Wright and Lord Simonds dissenting) that in fixing the amount payable by the enlarged borough of Newport in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county of Monmouth, the duty of the arbitrator was to fix such sum as seemed to him equitable having regard to the circumstances and considerations indicated in the rules in sch. 5 to the Act of 1933, but disregarding the figure of re-apportionment referred to in the proviso to r. 1; the proviso does not give any direction to the arbitrator that the proper deduction in respect of the general exchequer grant is to be arrived at by taking the whole amount of the grant to the unreduced county as it existed immediately before the transfer.

Per Viscount Simon: The right deduction to be made from the expenses of the reduced county is not necessarily the proportion of the previous grant which corresponds to the reduction in rateable value and the arbitrator would not be exceeding his discretion if he were influenced, in suitable cases, by comparisons of population or area but, inasmuch as the previous grant which was income in the hands of the unreduced county had to be used in proportionate relief of the ratepayers, the arbitrator would be well justified in treating such portion of the previous grant as corresponded to the reduction in rateable value as the appropriate set-off against the expenditure of the reduced county.

Held, further, unanimously by their Lordships, that the borough council was not liable to pay interest to the county council on any sum awarded, in respect of the period between the date of the transfer and the date of the award.

Decisions of the Court of Appeal (sub nom. *Monmouthshire County Council v. Newport Borough Council*) (1946) 175 L. T. 293, affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Morton and Tucker L.JJ.)

The Newport Extension Act, 1934, altered the boundary between the borough of Newport and the administrative county of Monmouth by transferring to the former a piece of adjoining

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territory formerly included within the area of the latter. The day appointed for the transfer was April 1, 1935. The alteration of boundary called for certain financial adjustments between the Newport Borough Council and the Monmouthshire County Council, which, so far as not agreed, were, by virtue of s. 58 of that Act and s. 151, sub-s. 3, of the Local Government Act, 1933, to be determined by the award of a single arbitrator. One of the matters not agreed was that mentioned in s. 152, sub-s. 1 (b) of the Act of 1933, viz., provision for the payment to the county council "of such sum as seems equitable, according to the rules contained in sch. 5 to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries . . . will properly be thrown on the ratepayers of the area of [the county council] in meeting the cost incurred by [the county council] in the discharge of any of their functions." The regulations made under para. (b) of sub-s. 1, of s. 108, of the Local Government Act, 1929, required that on an alteration of boundaries taking place an adjustment should be made in the general exchequer grant previously payable to the county council and this was done by the Minister of Health. This grant, provided for by s. 86 of the Act of 1929, was an annual contribution by Parliament towards the expenses of the county council.

The area transferred is hereinafter called "the transferred area." The area not transferred is hereinafter called "the reduced county." The area of both together is hereinafter called "the unreduced county." It was agreed that 4·432 per cent. of the ratepayers of the unreduced county belonged to the transferred area and 95·568 per cent. to the reduced county. The general county expenditure in the unreduced county immediately before the transfer, for the financial year, 1934/35 was 745,942*l.* This was met by (a) 355,744*l.*, being income of the county council derived from the grant and (b) 390,198*l.* proceeds of the rates. The sum of 355,744*l.* reduced the burden on the ratepayers of the transferred area by 15,767*l.* and on those of the reduced county area by 339,977*l.* Of the sum of 390,198*l.* the ratepayers of the transferred area contributed 17,293*l.* and those in the reduced county area 372,905*l.* By reason of the reduction of area, the county expenses were reduced from 745,942*l.* by 8,385*l.*, so that in future the expenditure to be met from the rates and the grant combined in the reduced county would be 737,557*l.* As the previous expenses attributable to the reduced county area were 712,882*l.* before

the transfer, this involved an increased burden of 24,675*l.* For the financial year 1935/36 following the alteration of boundaries the total income received by the borough council and the county council by way of grant was apportioned by the Minister of Health under the regulations made under s. 108, sub-s. 1 (b), of the Act of 1929. By this apportionment the income received by the county council from the grant was reduced from 355,744*l.* to 344,487*l.* during the remainder of the fixed grant period provided for by that Act. The ratepayers in the area of the reduced county received by way of reduction of rates the benefit of the whole of the 344,487*l.* because they did not have to share the benefit of that sum with the ratepayers of the transferred area. Had there been no alteration of boundaries the expenditure borne by grant and rates respectively would have been (a) 339,977*l.* + 372,905*l.* = 712,882*l.* in the reduced county area and (b) 15,767*l.* + 17,293*l.* = 33,060*l.* in the transferred area. The difference between the new expenditure in the reduced county (viz., 737,557*l.*) and the old expenditure in respect of the same area (viz., 712,882*l.*) was 24,675*l.*

The net amount claimed by the county council was 532,443*l.* The item in this sum attributable to the adjustment in respect of increase of burden was 510,066*l.*, this item being the one here in question. In sch. 5 to the Act of 1933 were set out :

“ Rules for Determining Sum to be Paid in Respect of
“ Increase of Burden on Ratepayers.

“ 1. Regard shall be had to (a) the difference between the
“ burden on the ratepayers which will properly be incurred by
“ the local authority in meeting the cost of executing any of
“ their functions and the burden on the ratepayers which would
“ properly have been incurred by the local authority in meeting
“ such cost, had no alteration of boundaries or other change
“ taken place ; (b) the length of time during which the increase
“ of burden may be expected to continue : Provided that no
“ alteration of income in consequence of an apportionment
“ under the regulations made under para. (b) of sub-s. 1 of s. 108
“ of the Local Government Act, 1929, shall be taken into
“ account. 2. The sum payable to a local authority in respect
“ of the increase of burden shall not exceed, or if payable by
“ instalments or by way of annuity, the capitalized value of the
“ instalments or annuity shall not exceed, the average annual
“ increase of burden multiplied (a) so far as that increase of
“ burden is attributable to the cost of maintenance of roads,
“ by twenty-one ; and (b) in other cases, by fifteen. 3. Any

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"sum payable in respect of the cost of the maintenance of county roads shall, unless otherwise agreed, be payable by way of annuity." The county council contended that the annual increase of burden on them in respect of general county purposes was 24,675*l.* To this they added an agreed sum of 3,722*l.* in respect of special county purposes, making together 28,397*l.* (1). Certain matters forming part of the claim were agreed but as regarded the remainder, and in particular, the alleged annual increase of burden in respect of general county purposes, the parties were unable to agree and by an agreement in writing, dated June 7, 1943, the matters requiring adjustment were referred to an arbitrator (Mr. W. Craig Henderson K.C.), and it was agreed that he should state a consultative case for the decision of the court. The questions of law to be determined were (a) the true construction of r. 1 of sch. 5. to the Local Government Act, 1933, and (b) whether the arbitrator had power to order interest to be paid on any sum he might award to the county council from any date anterior to his award. The dispute between the parties on the first question turned on whether, in calculating the increase of burden on the ratepayers of the reduced county, the alteration of income, which, in view of the proviso to r. 1 of sch. 5, must not be taken into account, was (a) the reduction from 355,744*l.* to 344,487*l.* of the total income received by the county council by way of grant, or (b) the increase from 339,977*l.* (viz., the benefit from the grant formerly enjoyed by the ratepayers of the reduced county area) to 344,487*l.* (viz., the benefit from the grant which those ratepayers enjoyed after the transfer). The borough council contended for the former and the county council for the latter alternative. On the construction of r. 1 of sch. 5, Atkinson J. decided in favour of the county council. The question as to interest he decided in the negative. The Court of Appeal affirmed his decision on both points. The borough council appealed to the House of Lords on the first point and the county

(1) By the Local Government Act, 1933, s. 180, sub-s. 1: "... (a) The expression 'general county purposes' means all purposes declared by this Act or any other enactment or by any statutory order to be general county purposes, and all purposes for expenditure on which the whole of the county is chargeable, and all purposes	"which are not made special county purposes by or under any enactment or statutory order; and (b) The expression 'special county purposes' means any purposes for expenditure on which part only of the county is chargeable, whether by reason of any part of the county being exempt therefrom or otherwise."
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council on the second point. The appeals were argued successively.

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Willink K.C., Fitzgerald K.C. and Rimmer for the appellants, the Newport Borough Council. Since the Local Government Adjustments Act, 1913, there has been provision by statute for an adjustment as between two local authorities in respect of the increased rate burden on the reduced county, resulting from a loss of territory. Previously a claim of that sort did not lie: see *Caterham Urban District Council v. Godstone Rural District Council* (1) and *West Hartlepool Corporation v. Durham County Council* (2). This appeal depends on the successor to the Act of 1913, the Local Government Act, 1933. The general exchequer grant, on which the calculation depends, originated in the Local Government Act, 1929, and arose out of three matters: (a) the Act dealt with certain rates and grants which were no longer going to the local authorities and which the new grant took into account; (b) the grant was in substitution for the rates which disappeared by reason of the derating proposals in the Act; (c) it provided for assistance in relation to need, to relative wealth and poverty, as Parliament deemed that it could be assessed. There were "grant periods" but, on an alteration of areas, provision had to be made as to the allocation of the grant, because on a change of relative areas the proportions change. When that happens various elements which give rise to the calculation of relative need have to be estimated again. Under the Act of 1929 the Minister has power to make regulations as to what is to be done in re-apportioning the grant and under r. 1 of sch. 5 to the Act of 1933 the arbitrator must not take into account any alteration of income consequent on such an apportionment. The reason for this exclusion is that Parliament intended the Minister to give under his regulations, as it intended to give under its statute, the appropriate relief to local authorities; if, on a change of boundaries one became more grantworthy and the other less grantworthy, by reason of the character of the areas which had been transferred from one to the other, Parliament took the view that a loss arising to the one which became less grantworthy, so that there was an increase of rate burden,

(1) [1904] A. C. 171.

(2) [1907] A. C. 246.

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should not be cancelled out in whole or in part by that loss being brought into account. The arbitrator must fix an equitable sum in respect of the increase of burden according to certain statutory rules. The question here is how to account for the grant in his calculation. That calculation will be affected if the area taken away has contributed more in rates in the year of severance than the expenditure which it caused by its presence in the county, so that on the transfer there will be an increase of rate burden in the reduced county. On the point now in dispute the basis of the calculation is, according to the borough council's contention, the grant which the county was receiving immediately before the change of area. The case for the county council rests on a comparison between the aggregate rateable value of the reduced county and the aggregate rateable value of the unreduced county. The comparison between the calculations of the parties can be put in the form here set out. The left-hand half is headed "Would have been" (meaning the burden which would have been placed on the ratepayers of the reduced county area if the change had not taken place). The right-hand half is headed "Will be" (meaning the burden which will be imposed in the future). The top half represents the borough council's calculations and the bottom half the county council's calculations ;

S. L. D. I.

	WOULD HAVE BEEN	WILL BE
	745,942 <i>l.</i>	745,942 <i>l.</i>
	355,744 <i>l.</i>	8,385 <i>l.</i>
Newport	390,198 <i>l.</i>	737,557 <i>l.</i>
	17,293 <i>l.</i>	355,744 <i>l.</i>
	372,905 <i>l.</i>	381,813 <i>l.</i> + 8,908 <i>l.</i>
	745,942 <i>l.</i>	745,942 <i>l.</i>
	33,060 <i>l.</i>	8,385 <i>l.</i>
Monmouthshire	712,882 <i>l.</i>	737,557 <i>l.</i>
	339,977 <i>l.</i>	339,997 <i>l.</i>
	372,905 <i>l.</i>	397,580 <i>l.</i> + 24,675 <i>l.</i>

The following table sets out conveniently the division of the expenditure for general county functions among the respective areas had no alteration in boundaries taken place, the 95·568 per cent. representing the reduced county and the 4·432 per cent. the transferred area :

S. L. D. 2.

	100%	95·568%	4·432%
Rate and grant-borne expenditure	745,942 <i>l.</i>	712,882 <i>l.</i>	33,060 <i>l.</i>
Rate-borne expenditure ..	390,198 <i>l.</i>	372,905 <i>l.</i>	17,293 <i>l.</i>
Grant-borne expenditure ..	355,744 <i>l.</i>	339,977 <i>l.</i>	15,767 <i>l.</i>

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In the two calculations there are only two differences : (a) the difference of approach in the " would have been " calculations, the result being the same, and (b) the far more vital difference between the penultimate figures in the " will be " calculations of the two authorities, the difference between 355,744*l.* and 339,977*l.* As that is the only difference it is self-evident that the difference between those two figures is the same as the difference between 8,908*l.* and 24,675*l.*, viz. 15,767*l.* It is, in fact, 4·432 per cent. of the pre-change grant. Both in the " would have been " and in the " will be " calculations one must arrive at the expense which has to be met out of rates and grant. Looking at the Newport figures, one does that at once in the very first figure of the " would have been " calculation but in the " will be " calculation one has to make a deduction to reach it, because one is working on the pre-change figure and one has to deduct the expenditure saved. Therefore, if the 737,557*l.* were printed at the same level as the 745,942*l.* in the left hand column that would bring it to the eye ; they are comparable figures. Then, just as the deduction of the grant was the first step in the left-hand column, so it is the next step in the right-hand column : the 355,744*l.* is deducted in each case from the relevant rate- and grant-borne expenditure. But in the left-hand column there is another step, because one is considering the ratepayers in the new county and, therefore, one has to deduct from the total rate-borne burden of the unreduced county that part of the burden which would have been borne by the ratepayers in the transferred area. The effect of the relevant statutory enactments is to direct the arbitrator to make two calculations, of the " would have been " burden and of the " will be " burden. In ascertaining the former he

H. L. (E.) must bring into account the unreduced county by way of grant, viz., 355,744^l. In ascertaining the latter he must similarly bring it in. Finally, the legislature says in effect: "In fact " that item of income will be changed in quantum but of that " change you are to take no account." The calculation does not depend on rateable value and it is wrong to describe the grant as something "enjoyed" by the ratepayers. Its whole essence is that it is income of the county. There are two conceptions running parallel in all this matter. First, there is the conception of the local authorities which are responsible personæ, so far as fulfilling the functions laid on them by Parliament are concerned, and which are thought of as throwing a burden on the ratepayers. Yet Parliament also had in mind the individual human beings, in so far as they are also ratepayers, who are affected by the responsibilities of the local authorities. Thus, a confusion arises, but, in respect of the adjustments, what is dominant is the position of the local authorities. In this light, the arbitrator under r. 1 is to have regard to the difference between two things, and the question of law is whether he is to assume that the grant will continue at the same figure, as the borough council say, or whether he is to treat it as apportionable between the two parts into which the county may be considered to have been divided.

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[VISCOUNT SIMON. The House has been considering whether we could make a suggestion which would perhaps clarify and shorten the discussion. We have tried to formulate the question and this is what I have written down: "When a " borough (like Newport) takes in a portion of the adjoining " county (like Monmouthshire) and an arbitrator is appointed " (owing to absence of agreement) to fix the amount properly " payable by Newport thus enlarged to the reduced county " in respect of the increase of burden thrown by the transfer " on the ratepayers of the reduced county in meeting the cost " incurred by the latter in the discharge of any of its functions, " is the proper deduction in respect of general exchequer grant " to be arrived at by taking the whole of the general exchequer " grant to the unreduced county as it existed immediately " before the transfer (as the appellants contend) or by taking " that proportion of such general exchequer grant as bears the " same relation to the whole as the rateable value of the " reduced county bore to the rateable value of the unreduced " county in the year preceding the change (as the respondents " contend) or such other proportion as the arbitrator, having

“ regard to all the other circumstances of the case, thinks in his
“ discretion equitable ? ” I am anxious to be sure that you
both agree on the language of the question.]

Willink K.C. I think it expresses the point exactly.

Sir Walter Monckton K.C. for the county council. I share the
view that it expresses the point.

Willink K.C. The proviso to r. 1 read with the rule amounts
to a direction that the whole of the former grant is to be assumed
to be retained by the reduced county. Provision is to be made
for a suitable equitable calculation of an increase of burden to
the ratepayers. So far as they are concerned the extent of their
burden must depend on crediting what is contributed from
other sources and is not raised from them at all. Accordingly
one must put into the calculation what is received from the
grant. But there is an express prohibition not to regard the
change in the amount so received as being in itself significant
because if one did that one would cancel the new concession
made for purposes concerned not with rateable value but with
the governing characteristics of the new and reduced area which
justify an additional contribution to help it. The amount to be
deducted is the immediate pre-change grant. The increase
from 339,977*l.* to 344,487*l.* of the amount of grant which enured
to the benefit of the ratepayers of the reduced county by way of
reduction of rates payable by them was not an increase in
consequence of the apportionment (which in fact did not
increase the grant at all but reduced it by 11,257*l.*) but was an
increase in consequence of the transfer of the transferred area
to the borough of Newport, with the result that the ratepayers
of the reduced county now have the benefit of the whole of the
grant payable to the county council and do not have to share
that benefit with the ratepayers of the transferred area.
Further the grant was to be periodically revised (see s. 86,
sub-s. 2, of the Act of 1929), and two years after the severance
in this case a new grant period began but any change this
effected was something which the arbitrator could not have
been intended to take into account. [They referred to *Swift &
Co. v. Board of Trade* (1) ; *Caterham Urban District Council v.
Godstone Rural District Council* (2) ; *West Hartlepool Corpora-
tion v. Durham County Council* (3) ; *Queenborough Corporation
v. Sheppey Rural District Council* (4) ; *Godstone Rural District*

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(1) [1925] A. C. 520.

(2) [1904] A. C. 171, 172, 174.

(3) [1907] A. C. 246.

(4) [1915] 1 K. B. 356, 359, 361,

362, 363, 364.

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Council v. Croydon Corporation (1) and *Oxford City Council v. Oxfordshire County Council* (2).]

Sir Walter Monckton K.C., Simes K.C. and Harold B. Williams for the county council. By s. 152, sub-s. 1 (b), of the Act of 1933 provision was made for payment to a local authority of such sum as seems equitable in respect of any increase of burden properly thrown on the ratepayers in consequence of the change of boundaries. They must be ratepayers of the reduced county after the abstraction of part of its territory. One is looking at the future to see what burden will fall on them and one is no longer concerned with the ratepayers of the transferred area. To find the increase of burden one compares what they would have borne but for the change and what they will be bearing. The burden of the rate- and grant-borne expenditure of the whole county could never have been theirs. They would not have been relieved by the whole of the grant but by the appropriate proportion of the grant attributable to the area of the reduced county; they would not have had for their relief the whole of the 355,744*l.*, but only their rateable proportion of it. The grant must be operated on a rateable value basis, although its quantum is not arrived at by reference to rateable value. The problem of the individual ratepayer is what he must pay in the pound and by how much in the pound he is relieved. As to the effect of the alteration of boundaries, one knows not only the old amount of the grant and the forbidden figure of the Minister's apportionment but also the proportions of the grant in terms of rateable value, attributable to the transferred area and the reduced county. These are the relevant facts which show what would have been the burden on the ratepayers of the reduced county area had there been no change of boundaries. In the circumstances, in calculating the "will be" burden, the question is this: Is the arbitrator bound to assume that the ratepayers (who, but for the alteration of boundaries, would have been relieved to the extent of 339,977*l.* and no more) will be relieved to the extent of the whole 355,744*l.* after the change of boundaries? Is he precluded from saying: "These ratepayers but for the alteration of boundaries would have been relieved by 339,977*l.*" "I am told to ignore the Minister's apportionment and the best way of doing that is to assume that they will go on getting, after the change, what they got before, viz. 339,977*l.*" The crucial point in the argument is the emphasis laid, on the

(1) (1932) 102 L. J. (K. B.) 34, 36, 37. (2) [1939] A. C. 48, 66, 67.

one hand, by the county council on the increase of burden on the particular ratepayers and, on the other, by the borough council on income of the local authority. But, leaving aside this difference, the thing to be compared is a past burden and a future burden on the ratepayers. In the past, and in the future, the effective burden is got by setting income against expenses and this grant is a particular head of income. The effect of the proviso to r. 1 is that in calculating outlay minus income no regard is to be had to alterations of income so far as they are due to the new amount of the grant after the transfer. The total rate- and grant-borne expenditure is something which has to be borne by the ratepayers of the county in proportion to rateable value and, just as in the case of rates one must see that they are borne in rateable proportions, so in the case of the grant relief in reduction of rates one must attribute to them (because it has to be attributed on a rateable value basis) relief in proportion to the rateable value. The two things are in *pari materia*. If, in a calculation of increase of burden, one is to compare like with like one must start by saying in relation to these ratepayers that they would have been relieved by 339,977*l.* not 355,944*l.* Looking at the future, it would be a very artificial calculation, in order to reach an increase of their burden, to assume that they were going to get the 355,744*l.* which they could never have got and which, after the Minister's apportionment, they will not get. Summing up, the county council relies on two points: (a) It is wrong to take the figure of 355,744*l.* which these ratepayers would not have got before and would not get after the change of boundaries; (b) The only alternative known figure is the amount of the relief of the burden of the relevant ratepayers as it would have been but for the alteration of boundaries,, viz., 339,977*l.*

Willink K.C. in reply. The expression "rate- and grant-borne expenditure" used by counsel for the county council is misleading. As used by them it lies at the heart of their calculation of the "would have been" burden. The burden is that which falls on the ratepayers, not that which, but for someone who shoulders part of the expenditure, would have fallen on them. One cannot begin to arrive at the burden on the ratepayers until one has disposed in one's mind of the provision which is otherwise made. Further, under the proviso to r. 1 "income" means income of the local authority, although the ratepayers collaterally benefit. The local authority receive and spend it, not as ratepayers or for the ratepayers,

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but for general county purposes ; they spend it just as much for those who are not ratepayers as for those who are. The result for which the county council contend would have been reached if the wording of the proviso had been : " Always " provided that in the assessment of increase of burden all " grants payable under part VI of the Local Government " Act, 1929, shall be left out of account." But the proviso, in saying that one must not look at a certain alteration of income, impliedly says that this form of income, like all other forms of income, is to be brought into account. In the borough council's calculation it is assumed that the grant will continue to be 355,744 $\frac{1}{2}$ l. No account was taken of the fact that under the Act of 1929 the grant was liable to be varied for the period commencing April 1, 1937. There are three alternatives before the House : (a) That for which the borough council contend, viz., that it is to be assumed that the county council continues after the transfer to receive the grant it was receiving before ; (b) that the arbitrator is to do his best to calculate the whole future from April 1, 1935, both as to what Parliament would have done for the unreduced county and would do for the reduced county with its new area and differing population and characteristics ; it is submitted that this is not what he was expected to do ; (c) that contended for by the county council, that the reduced county with its new characteristics would get 95·568 per cent. of what it used to get.

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Sir Walter Monckton K.C., Simes K.C. and Harold B. Williams for the county council. The first problem is whether, in one form or another, interest can be awarded and the second, whether, if it may be awarded, it must be taken into account in determining the maximum under r. 2 of sch. 5 to the Act of 1933. Whether or not the element of interest must be taken into account in calculating the maximum depends on whether one regards the interest as something separate from the increase of burden or whether it is one of the yardsticks by which one calculates an equitable sum for increase of burden. In the latter case it would have to be taken into account. The ultimate question is: What is the arbitrator's power,

having regard to the language of the statute which gives him his appointment? The arbitrator has a discretion to award interest on any sum he may award to the county council in respect of the period between the date of transfer and the date of his award, having regard to the duration of the delay. His powers are to make an adjustment of financial relations and that includes, as its most important element, an equitable sum in respect of the increase of burden. He would not really harmonize the financial relations of the parties if, in working out the adjustment, he left out of account the fact that for ten years the burden had been on the wrong shoulders. Under r. 2 he is only bound not to exceed the maximum laid down, and he can award interest on what would otherwise have been the equitable sum under s. 151, sub-s. 1 (b), of the Act of 1933, in order to get the sum which is equitable at the date of the award. The loss of interest inevitable in the circumstances of this case is an essential element in the estimate of increase of burden. Under the broad language of s. 151, sub-s. 1, of the Act of 1933, the parties would have been free to adjust their financial relations in the light of all the factors which could be taken into account when the adjustment was made, including the fact that during the lapse of time the borough council had been relieved of interest and the county council had had to bear a corresponding burden which on the adjustment should have been otherwise borne. The arbitrator has a discretion to do the same. [They referred to *Caterham Urban District Council v. Godstone Rural District Council* (1); *Swift & Co. v. Board of Trade* (2); *Toronto City Corporation v. Toronto Ry. Corporation* (3); *Bullington Rural District Council v. Oxford Corporation* (4); *Inland Revenue Commissioners v. Ballantine* (5); *International Ry. Co. v. Niagara Parks Commission* (6) and *Southport Corporation v. Lancashire County Council* (7).]

Willink K.C., *Fitzgerald* and *Rimmer* for the borough council, were not called on to argue.

THE HOUSE took time for consideration.

(1) [1904] A. C. 171, 174.

(5) (1924) 8 Tax Cas. 595.

(2) [1925] A. C. 520, 525, 532,

(6) [1941] A. C. 328, 329, 344.

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(3) [1925] A. C. 177, 193.

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(4) [1936] 3 All E. R. 875, 877,

(7) [1937] 2 K. B. 589, 590, 591,

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May 16. VISCOUNT SIMON. My Lords, the question to be decided is raised in a consultative case stated by the arbitrator, Mr. Craig Henderson K.C. As some discussion arose on the language in which the question was phrased, it was, at the suggestion of the House and with the agreement of the parties, re-formulated as follows: "When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of general exchequer grant to be arrived at by taking the whole amount of the general exchequer grant to the unreduced county as it existed immediately before the transfer (as the appellant contends) or by taking that proportion of such general exchequer grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the respondent contends), or such other proportion as the arbitrator having regard to all the other circumstances of the case thinks in his discretion equitable?"

In view of the fact that there has been much arithmetical addition and subtraction, based on precise figures, in the argument presented to this House—and, indeed, in the judgments which we have to review—I wish in the first place to emphasize that the arbitrator's task under the statute is to fix "such sum as seems equitable," and while he is not to "take into account" a certain "alteration of income" referred to in the proviso, his duty in other respects is not necessarily to be governed by exact calculations so much as to exercise a broad judgment under the rule that "regard shall be had" to the matters mentioned. He is to arrive at what he judges to be an equitable figure, and this primary consideration—applied within the statutory limits negative and positive—controls any arithmetical conclusion which he does not deem to be fair and reasonable.

With this preliminary observation, I address myself to the

problem to be solved. What is called for is a comparison of two burdens on a body of ratepayers, each burden being estimated to arise in the future, one on the assumption that the alteration of boundary has taken place, and the other on the assumption that it has not. The contrast has been neatly described as between the "will be" burden and the "would have been" burden. The ratepayers in question are, in both cases, the ratepayers of what may be called the "reduced" county, i.e., of so much of the county as is left after the transferred area is, actually or notionally, taken away from it. This is agreed to be the meaning of "the ratepayers" in para. 1 (a) of the schedule; it is implied in the agreed question; and it is necessarily so if we are to compare like with like. By the burden on these ratepayers is, of course, meant the net burden, i.e., that part of the expenditure for general county purposes in the area of the "reduced" county which is left to be borne by them after taking credit for grants from central funds. Such grants take two forms, some being equivalent to a portion of approved expenditure for specific purposes, such as police, while the so-called "block-grant"—in statutory language the "general exchequer grant"—under the Local Government Act, 1929, does not depend on local expenditure but is derived from an apportionment to each county or county borough out of a total sum annually provided by Parliament called the general exchequer contribution. This contribution is fixed for a period of years, and is then revised for a subsequent period. The apportionment (subject to the provision of an amount mentioned in s. 88, sub-s. 1 (a), of the Act of 1929) is in proportion to the "weighted population" of the several areas, that is to say its amount is affected by such considerations as the rateable value per head of population, the number of children in the area under five years of age, the extent of unemployment in the area, and the mileage of roads to be maintained. We are not concerned in the present case with the first form of grant, which has been suitably dealt with, but solely with the relief provided by general exchequer grant. The best estimate available of the burden on the relevant ratepayers if there had been no alteration of boundaries does not appear to be a very difficult matter to arrive at, though as the burden lies in the future, precision is impossible. Taking the unreduced county, the general county expenditure was partly met by the block grant and the balance is the burden borne by the ratepayers of the whole county. Since we are

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seeking to arrive at the burden on the ratepayers in the reduced area, it is necessary to take a part of this total which is proportionate to the reduction in rateable value. This gives a figure of annual burden to which the proper multiplier can be applied. Using the figures in the case, the general county expenditure in the unreduced county for the year 1934-35 was 745,942*l.*; the income of the county authority derived from the block grant was 355,744*l.*; the burden on the ratepayers of the county was, therefore, 390,198*l.* Of this sum 17,293*l.* would fall on ratepayers in the area which is the subject of transfer, and 372,905*l.* will therefore be a proper figure to take as the annual burden on the ratepayers of the reduced area if there had, in fact, been no alteration of boundaries.

Turning now to the estimate of the burden that will be incurred by the ratepayers in this area after the alteration of boundary takes place, the calculation, so far as it is a matter of arithmetic, must be based on similar elements. As the size of the county is reduced, the general county expenses will be diminished, but not necessarily diminished in proportion to the loss of area or of rateable value. In fact, the case states that by reason of the reduction of area the general county expenses were reduced by 8,385*l.* so that the "will be" expenditure to be met from rates and grant combined may be taken to be 737,557*l.* The whole question of difficulty is to decide what is a proper figure of general exchequer grant to be subtracted from this last figure in order to estimate the "will be" burden on the relevant ratepayers. It is argued for the appellant that the proper figure to deduct from this reduced expenditure is the whole amount of the general exchequer grant to the unreduced county as it existed at the moment of transfer, viz., 355,744*l.* It is pointed out that the grant is the income of the county. It does not belong to any set of ratepayers but to the county authority itself. And the contention is that, at the date when the boundary is altered, and the area of the county thus reduced, the whole sum must still be treated as the income of the reduced county and that the total operates to reduce the burden which would otherwise fall on the ratepayers of the reduced area. There are, however, two considerations which lead me to the conclusion that this argument should be rejected. First, these estimates are as to the future, and it is not the fact that after the change of boundary the county authority will continue to receive in the future the same grant as before. At any rate, it would be the purest coincidence

if the same total continued to be paid. On the alteration of boundary taking place, regulations made under s. 108 of the Act of 1929 require an adjustment to be made in the grant previously payable to the county, having regard to the "weighted population" of the reduced area. This was done and the new figure was 344,487*l.* The proviso to r. 1 of sch. 5 prohibits the arbitrator from taking the alteration from 355,744*l.* to 344,487*l.* into account, i.e., his calculations are to be made without making use of the latter figure, but that is no sufficient reason for saying that he is required to attribute to the reduced county in the future a figure of income which it will never receive at all. The resulting position, as it seems to me, is that the arbitrator is left to determine, from the facts and figures known to him to which he must or may have regard, what is the equitable deduction to make on the score of grant relief from the assumed expenses of the reduced county. How that task should be discharged I will discuss a little later. The second consideration is this. If the provisions of the statute require in every case the application of the arithmetical formula suggested by the appellant, there will be instances in which the result will be far from equitable, and may even become absurd. It would seem extraordinary if the position was that the greater the loss of area to the county the greater the advantage to its remaining ratepayers would be from an undiminished figure representing grant to the whole county before it suffered any diminution of area at all—a figure, moreover, that is greater than the deduction for grant in relief of such ratepayers in the "would have been" calculation. Consider the situation if the size of a county is reduced to a half, or less than a half, of its original area by reason of the lost area being absorbed into an adjoining borough. The result of such an operation would be that the expenditure of the county would be very greatly reduced. If, nevertheless, against this reduced expenditure the statute requires to be set the whole amount of the grant awarded to the county before it was divided, the result might well be that the ratepayers would have to find nothing at all. I cannot think that such a result could be the intention of the words used by Parliament and this confirms my conclusion that the arbitrator, instead of being tied down by a rigid formula, has to make the deduction which is equitable in the circumstances.

For myself, I should not be prepared to say that the right deduction to be made from the expenses of the reduced county

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is necessarily the proportion of the previous grant which corresponds to the reduction in rateable value. I do not think that the arbitrator would be exceeding his discretion if he was influenced in suitable cases by comparisons of population or of area. The whole thing is an estimate of what will happen in the future, and an estimate, moreover, of annual increase of burden to which the statutory multiplier is applied. But inasmuch as the previous grant which was income in the hands of the unreduced county had to be used in proportionate relief of ratepayers, it seems to me that the arbitrator would be well justified in treating such portion of the previous grant as corresponds to the reduction in rateable value as the appropriate set off against the expenditure of the reduced county. This is not to say that the grant belonged to the ratepayers: it did not. The grant is the income of the county council, but this income has to be used to reduce in due proportion the figure of the rate in the pound which the ratepayers are called on to pay.

For these reasons, I think the appellant's contention fails and the appeal should be dismissed, though I would propose to answer the question by saying that the arbitrator's duty is to fix such sum as seems to him equitable having regard to the circumstances and the considerations indicated in the rules but disregarding the figure of re-apportionment referred to in the proviso. Subject to the exercise of this discretion, he would be justified in reaching the conclusion approved by the Court of Appeal. I move that this appeal be dismissed.

LORD WRIGHT. My Lords, this appeal raises a question on the construction of a few words in ss. 151 and 152 and sch. V to the Local Government Act, 1933. These provisions (inter alia) define the mandate given to an arbitrator appointed to decide the differences which have arisen between the appellant council, the corporation of the county borough of Newport, and the respondent council, the county council of the county of Monmouth. The arbitrator, Mr. Craig Henderson K.C., was appointed under s. 151 above mentioned, to make an adjustment (inter alia) between the two councils of the financial relations between them in accordance with the section and with particular reference to the terms of s. 152 which requires that provision should be made for the payment to a local authority of such sums as seems "equitable, in accordance" with the rules contained in sch. V to this Act in respect of "any increase of burden which, as a consequence of any

"alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of its functions." Schedule V which contains "rules for determining sum to be paid in respect of increase of burden on ratepayers" for the guidance of the arbitrator prescribes that "1. Regard shall be had to (a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue." It then goes on to set out the proviso in respect of which primarily the arbitrator has stated the consultative case now brought on appeal before your Lordships. The proviso is in these terms: "Provided that no alteration of income in consequence of an apportionment under regulations made under para. (b) of sub-s. 1 of s. 108 of the Local Government Act, 1929, shall be taken into account." The first question which the arbitrator referred to the decision of the court is: "Whether . . . the contentions of the county council" (the respondents) "or the contentions of the borough council" (the appellants) which he sets out "are correct in law upon a true interpretation of the proviso . . . and if neither of the said contentions be correct in law, what is the true meaning and effect of that proviso?"

In order to clarify the issue, it was agreed during the course of argument between the parties that one aspect of the questions sought to be raised in the consultative case might be formulated thus: "When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of general exchequer grant to be arrived at by taking the whole amount of the general exchequer grant to the unreduced county as it existed immediately before the

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“transfer (as the appellants contend) or by taking that proportion of such general exchequer grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the respondents contend) or such other proportion as the arbitrator having regard to all the other circumstances of the case thinks in his discretion equitable.” In effect the substantial question is what is the true construction of the proviso. A second and separate question proposed in the consultative case namely whether the arbitrator has power to order interest, forms the subject of the second appeal between the same parties, now before your Lordships.

By the Newport Extension Act, 1934, which came into operation on April 1, 1935 (which is referred to later as “the appointed day”) the boundary of the county borough of Newport was altered so as to include in addition to the then existing borough a certain parish and parts of two other parishes. These “added areas” had been a part of the administrative county of Monmouth. The financial adjustments required to be made related to the addition of these added areas to the appellant and their subtraction from the respondent. The respondents put in a claim against the appellants which embodied the financial adjustment which the respondents contended should be made to compensate the respondents for the loss they had suffered by the transfer to the appellants of the added areas. The detailed claim amounted to 532,443*l.* of which 510,066*l.* represented what was claimed to be the increased burden thrown on the ratepayers of the respondent, based on an annual increase of burden totalling 28,397*l.*, of which 24,675*l.* was in respect of general county purposes and 3,722*l.* in respect of special county purposes. There was also a claim for interest.

The general exchequer grant to each county is apportioned by the Minister of Health out of the total sum voted by Parliament for the whole country in accordance with regulations made by the Minister under para. (b) of sub-s. 1 of s. 108 of the Local Government Act, 1929, which empowers the Minister to make regulations as to the manner in which grants payable under the Act are to be adjusted “if and so far as adjustment is required in consequence of any alterations . . . of boundaries taking effect on or after the appointed day.” This general exchequer grant is to be periodically revised, first

for a period of three years, then for a period of four years, and on any subsequent revision for a period of five years, in each case starting from the appointed day of each period. The county apportionment, as it is called, is determined by the Minister who is required to decide "in proportion to the "weighted population," according to his discretion under the regulations but he must have regard to not merely the number of ratepayers, but also to the special requirements under the Act of certain sections of the people called the weighted population because of these special requirements. The general grant was distinguished from the special grants made in respect of particular services. These special grants have been treated separately for purposes of this dispute. It is the general exchequer grant which is in question here in the case stated. That grant is for general county purposes, such as highways, public assistance, and so forth.

For the financial year 1935-36 which followed the alteration of boundaries, the income received by the respondents from the general exchequer grant was reduced by the Minister from 355,744*l.* which was the income received in the financial year 1934-35 before the alteration of boundaries, to 344,487*l.* which was to be the grant for the remainder of the fixed grant period. As in other years the grant went into the county fund and was used for general county purposes. The general exchequer grant being thus available for general county purposes went pro tanto to reduce the rate falling on the ratepayers individually. This effect is shown in the statement circulated to each ratepayer on the back of his demand note ; thus, in the specimen exhibited the total rate imposed is 12*s.* 3*d.* in the pound of which sum 4*s.* is met out of the exchequer grants leaving a rate in the pound of 8*s.* 3*d.* payable by the ratepayer. An alteration in the amount of the grant will accordingly alter the burden on the ratepayer. But the proviso enacts that any such alteration of income made in consequence of change in boundaries as between local authorities under s. 108 of the Act of 1929, which is quoted above, is to be disregarded by the arbitrator in determining the difference in burden on the ratepayers consequent on the alteration of boundaries. The view that to disregard the exchequer grant was inconsistent with the arbitrator's duty to make an equitable adjustment has perhaps led the Court of Appeal to attempt to overcome what seems to them to be a want of equity and to interpret the words of the proviso as still capable of receiving effect : the court has

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H. L. (E.) held that the alteration of the general exchequer grant or block grant is to be apportioned on the basis of the ratepaying population in the reduced county as compared with the unreduced county. It is agreed (at least for purposes of this comparison and as an illustration) that 4.432 per cent. of the ratepayers in the unreduced county area were transferred from the respondent county and added to the appellant county borough. The Court of Appeal held that the arbitrator should take this item into account in making his adjustment of the change in burdens consequential on the alteration of the boundaries. This might seem at first sight equitable. But it would, in my opinion, be directly in defiance of what appear to be the plain words of the proviso. I think it would also be inconsistent with the general scheme of the legislation and the true position. The problem which the arbitrator has to settle is to determine the difference in the burden on the ratepayers. He must ascertain that by way of an estimate of the future burden in the relevant period and on knowledge of the previous circumstances and his instructed forecast of the future course of events, always remembering that he is limited to the difference due to alteration of boundaries. This, however, is subject to what the proviso says is to be disregarded, namely, a particular alteration of the block or general exchequer grant. What then is the reason for what may seem an arbitrary limitation, arbitrary because the burden on the ratepayers may be increased by a change in the general exchequer grant coming to the county and thus, in fact, increasing the burden on them individually? It is, I think, possible to suggest several reasons for what may seem anomalous. The general exchequer or block grant comes to the county as an undifferentiated sum, based upon the decision of the Minister and not analysed by him so as to show to the county the component parts which he envisaged in arriving at his decision. It is, in fact, the result of the government policy; the exact amount of the block grant assigned to the county will not generally depend on number of ratepayers, because the ratepayers form only a portion of the population, the majority of whom are not ratepayers. And further, the amount of the grant will naturally depend on the services which the Government desire to provide for, in particular, the number of the population which come within the description of "weighted," that is, members of the population requiring special expenditure for the special benefit or services which Parliament has determined

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should be provided under its general policy. For these and similar reasons a counting of the ratepayers would be fallacious, and its result inequitable. The arbitrator could not know whether an alteration in the grant was due to an alteration in the boundaries or was for other reasons. These and other like considerations lead me to reject the view of the Court of Appeal that the block grant should be adjusted on a comparison of ratepaying population before and after the alteration of boundaries. Post hoc is not necessarily the same as propter hoc. If effect is given to the words of the proviso and the alteration in the general grant is ignored altogether the result will be in accordance with the proviso which will receive effect and the result will also, in my opinion, be logical. What the arbitrator has to decide is the difference in the burdens consequent on the alteration of boundaries ; as he cannot tell whether the alteration of the general exchequer grant is due to that alteration, he cannot, in any case, bring that item in, because it is unknown on what considerations of policy or otherwise the change is based. Furthermore, as a mere matter of construction I should construe " burden on the ratepayers " as meaning rate-borne burden limited to so much of that burden falling on the ratepayers as is incurred in executing their functions. So far as that cost is borne by the exchequer grant it is not incurred by the ratepayers and may well be left out of account. All that the arbitrator has to decide is the difference in burden. If the arbitrator leaves the general exchequer grant out of his computation on both sides of the account, he will show the difference in the rate-borne burden consequent on the alteration of the boundaries. In determining this difference the amount of the general exchequer grant will thus be seen to be irrelevant to the comparison.

I accordingly think that the question put by the arbitrator should be answered in favour of the appellant borough council, I agree substantially with the contentions of the appellant. I have not dealt with any question of figures, though I have found the figures put in helpful in deciding the question of principle. My conclusion is that as it is only the difference which the arbitrator is required to estimate that figure will be found by ignoring altogether the alteration in the general exchequer grant or perhaps more conveniently by putting the grant as a figure on each side of the annual account. The result may appear arbitrary because it disregards an item of account which may affect the total expenditure of the respondent council

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but it does not affect directly the annual difference of the rate-borne burden. This is, in my opinion, as I have said, the figure which the arbitrator has to find. This conclusion renders it unnecessary to consider any further alternative. For myself, I would allow the appeal.

LORD SIMONDS. My Lords, it will, I think, in the end, be found that the question in dispute between the parties to this appeal turns on a short point of construction, but it is necessary to state the circumstances which have given rise to it. By the Newport Extension Act, 1934, which came into operation on April 1, 1935, the boundary of the county borough of Newport (to which I will refer as "the county borough") was altered so as to include in the then existing borough certain parishes or parts of parishes which were before the alteration part of the administrative county of Monmouth. I will refer to the area so included as "the added area" and to the county of Monmouth as "the county." When it is important to distinguish between its area after and before the alteration I will refer to it as the "reduced" or the "unreduced" county as the case may be. Section 58 of this Act provided as follows: "(1.) Where in consequence of this Act any adjustment of any property income debts liabilities or expenses or of any financial relations is required an adjustment shall be made between the councils or other authorities affected under and in accordance with ss. 151 and 152 of the Act of 1933" (meaning the Local Government Act, 1933) "as if this Act were an order made under part VI of the Act of 1933." The material parts of s. 151 and s. 152 of the Local Government Act, 1933, and sch. V thereto are as follows: "151.—(1.) Any public bodies affected by any alteration of areas or authorities made by an order under this part of this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between the parties to the agreement . . . (3.) In default of an agreement as to any matter requiring adjustment, such adjustment shall be referred to the arbitration of a single arbitrator agreed upon by the parties, or in default of agreement appointed by the Minister, and the award of the arbitrator may provide for any matter for which an agreement might have provided . . . 152.—(1.) On an adjustment under the last preceding section the following provisions shall

" have effect : (b) Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in sch. V to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions."

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" Rules for Determining Sum to be Paid in Respect of Increase of Burden on Ratepayers.

" 1. Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions " (hereinafter referred to as " the will be burden ") " and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place " (hereinafter referred to as " the would have been burden ") ; " (b) the length of time during which the increase of burden may be expected to continue : Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. 1 of s. 108 of the Local Government Act, 1929, shall be taken into account. 2. The sum payable to a local authority in respect of the increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalized value of the instalments or annuity shall not exceed, the average annual increase of burden multiplied— (a) so far as that increase of burden is attributable to the cost of maintenance of roads, by twenty-one ; and (b) in other cases, by fifteen. 3. Any sum payable in respect of the cost of the maintenance of county roads shall, unless otherwise agreed, be payable by way of annuity."

Thus, it became necessary for the county and the county borough to make agreements for the purpose of the prescribed adjustments, or, failing agreement, to have the matter referred to arbitration. They reached a large measure of agreement but upon two matters of pecuniary importance they failed to do so. These matters were accordingly referred to Mr. W. Craig Henderson K.C. as arbitrator, and he, at the request of the parties, stated a case for the decision of the court.

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Before I state the questions raised by the special case, I must recall certain relevant facts. In the financial year 1934-1935, the county received an income by way of general exchequer grant of 355,744*l.* This grant, which originated in the Local Government Act, 1929, is made out of moneys provided by Parliament as an annual contribution towards local government expenses in counties and county boroughs. This contribution, which is called "the general exchequer contribution" is made subject to periodical revisions at the end of fixed periods which are called "fixed grant periods." The same Act provides for apportionment of the general exchequer contribution amongst the several counties and county boroughs in the manner therein specified and for the setting aside out of the county apportionment of every county (other than the county of London) of certain sums as therein mentioned and for the residue being paid to the council of the county. This residuary sum is the "general exchequer grant." It is the income of the county council and applicable by it for general county purposes. I think it unnecessary to say anything more about it, except that the amount of the grant is in no way determined by the rateable value of the county. I have said that the county in the year 1934-1935 thus received a grant of 355,744*l.*, and, since the grant is a contribution towards local government expenses, it follows that by that amount the burden which would otherwise fall upon the ratepayers was pro tanto reduced. This reduction can be arithmetically distributed as to 15,767*l.* to the ratepayers in the added areas and as to 339,977*l.* to those in the reduced county. I mention (but, observing the proviso to r. 1 to sch. V, mention only to forget it) that, consequent upon the alteration of boundaries, this general exchequer grant was apportioned by the Minister of Health under the regulations made under para. (b) of sub-s. 1 of s. 108 of the Local Government Act, 1929, and that, by this apportionment, the income received by the county from the general exchequer grant was reduced to 344,487*l.* during the remainder of the current fixed grant period.

Having stated the income of the county from the general exchequer grant and reminded myself that I must forget its alteration, I can now state the first matter in dispute between the parties. It is simply whether in calculating the increase of burden which, as a consequence of the alteration of boundaries, will fall upon the ratepayers in the reduced county (which is conveniently called the "will be" burden as distinguished

from the "would have been" burden, i.e., the burden that would have been theirs if there had been no alteration), the sum to be deducted in respect of the income received by the county by way of general exchequer grant should be 355,744*l.* or 339,977*l.* The rival contentions of the county borough and the county are stated in the case and the arbitrator by reference to them thus poses the first question for the decision of the court: "Whether . . . the contentions of the county council or the contentions of the borough council set out in paras. 21 and 22 of this case are correct in law upon a true interpretation of the proviso to para. 1 of sch. V to the Local Government Act, 1933, and if neither of the said contentions be right in law, what is the true meaning and effect of that proviso." At the risk of repetition it is worth while re-stating the question in the terms which counsel for the parties agreed after some argument in this House. They were as follows: "When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of general exchequer grant to be arrived at by taking the whole amount of the general exchequer grant to the unreduced county as it existed immediately before the transfer (as the appellants contend) or by taking that proportion of such general exchequer grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the respondents contend) or such other proportion as the arbitrator having regard to all the other circumstances of the case in his discretion thinks equitable?"

My Lords, I cannot see any justification for the respondents' contention. The task of the arbitrator appears to me a simple one. To ascertain the difference between the would have been and will be burdens he must first find what those burdens respectively are. The would have been burden presents no difficulty. Three factors enter into the calculation, (a) the expenditure by the local authority, (b) the income of the local authority, and (c) the balancing figure which represents the

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amount which the ratepayers have to find, or, in other words the "burden on the ratepayers." This last figure has itself to be divided between the ratepayers in the added area and those in the reduced county. For it is only the burden on these latter ratepayers that has to be considered. Concrete form can be given to this calculation by reference to the figures used in the case. Thus the would have been expenditure is assumed to be 745,942*l.* : the income, i.e., the general exchequer grant, is assumed to be 355,744*l.* : the burden upon all the ratepayers would be the difference between those figures, i.e., 390,198*l.* But of this sum 17,293*l.* would be borne by the ratepayers of the added area, so that the "burden upon the "ratepayers" to be considered by the arbitrator will be 372,905*l.* Next the arbitrator must find the will be burden. The same factors come into the calculation. First, the expenditure by the local authority : here it will probably appear that the reduction of the county area will effect some saving. Thus, in this case it is estimated that there will be a saving of 8,385*l.* The will be expenditure is therefore reduced from 745,942*l.* to 737,557*l.* Then the income of the reduced county is to be ascertained. Here there is no room for speculation. That income (so far as it is derived from general exchequer grant) will remain the same during the remainder of the current fixed grant period unless it is altered. But it is just at this point that the respondents, as it appears to me, fall into error. The income being the income of the county and of no one else, they yet treat it as if it were the income of the ratepayers and as if it were distributable between the added area and the reduced county according to rateable value. Thus such expressions as the amount of grant "referable to the added "area" were commonly used by counsel for the respondents and are to be found in the judgment of Lord Greene M.R. I find no authority for this in the language of the rule. I repeat that, to ascertain the will be burden, the arbitrator must find the income of the reduced county and there is no reason why he should ignore a fact which he knows, viz., that the income will be 355,744*l.* until it is altered and substitute a figure, which is itself based on a fundamental fallacy, viz., that any part of it was ever referable to any part of the county area. It was not and is not. The whole of it is the income of the county. Having thus found the will be expenditure (737,577*l.*) and the will be income (355,744*l.*) of the reduced county the arbitrator will deduct the one from the other and

find the will be burden to be 381,813*l.*, i.e., greater by 8,980*l.* than the would have been burden. My Lords, I hope that I have not over-simplified what appears to me a very simple case. But as soon as it is appreciated that the general exchequer grant is not the less the income of the county because the ratepayers are by that fact spared a call upon their pockets which is necessarily proportionate to the rateable value of their hereditaments, and that it will remain the income of the county notwithstanding that there may be an alteration of boundary unless and until it is altered, and that no actual or possible alteration of income in consequence of an apportionment by the Minister is to be taken into account, that is really the end of the elaborate case made by the respondents.

There is, however, one aspect of the case upon which I must say something more. The income of the reduced county, so far as it consists of general exchequer grant, may be altered during the current fixed grant period by an apportionment made by the Minister. This alteration must be ignored. But, it is said, this is not the only possible alteration of such income. For, in the next fixed grant period, a second alteration may be made. Indeed, we know that it was. Ought not this possibility to be taken into account by the arbitrator in fixing his equitable sum? My Lords, the short answer is that it should not, because the only thing which the arbitrator has to consider is an increase of burden due to an alteration of boundaries. The apportionment by the Minister to which the proviso relates is directly due to that fact. That is why it had to be specifically mentioned if it was to be excluded from consideration. But the alteration made in the next fixed grant period (which would itself be an alteration of the sum apportioned by the Minister) might be due to a number of factors other than the alteration of boundaries, that factor having already been provided for by the Minister's apportionment. Therefore, such subsequent alteration is not a matter for the arbitrator to consider. This appeal should, therefore, in my opinion, be allowed and the first question posed by the arbitrator answered by saying that the contentions of the borough council set out in para. 22 of the case are correct in law upon a true interpretation of the proviso in question.

LORD DU PARCQ (read by LORD NORMAND). My Lords, without restating the question which has been propounded for your Lordships' consideration, I will at once address myself

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to it. If there were no general exchequer grant it would be easy to see how the burden on the ratepayers of the reduced county was likely to be affected by the alteration of boundaries.

I will use the figures which have been adopted hypothetically by both sides. Before the severance the total expenditure of the unreduced county was 745,942*l.* If there had been no grant, the burden on those of the ratepayers who are now left within the reduced county would have been 712,882*l.* In future the estimated expenditure of the county will be less than 745,942*l.*, but less only by 8,385*l.*—that is to say, it will be reduced to 737,557*l.* This would leave an additional burden of 24,675*l.* to be borne by the ratepayers of the reduced county by reason of the alteration of boundaries. The same result is, of course, arrived at by deducting the estimated saving of 8,385*l.* from the sum of 33,060*l.* which represents the rates lost to the reduced county by reason of the amputation which it has suffered. We know, however, that the total burden on the ratepayers of the unreduced county was alleviated by the grant and that the total burden on the ratepayers of the reduced county will be lightened by a revised grant. How do these facts affect the calculation which the arbitrator is called upon to make? The grant is, of course, part of the income of the county, but its relevance to the present inquiry is that it reduces the burden on the ratepayers. The general exchequer grant is so apportioned as to compensate ratepayers for abnormally heavy burdens which have been put upon them because of circumstances which exist in the areas in which they are rated, because (for instance) of an unusually high degree of unemployment or exceptionally heavy liabilities for road upkeep. Thus, the grant apportioned to a particular area is proportionate to the needs of that area, and when it is revised it will (on the assumption that the amount of the exchequer contribution is unaltered) go up or down according as those needs become greater or less. When there is an alteration of boundaries there is a new apportionment of the grant as between the areas affected by the change. When the county of Monmouth was reduced and the borough of Newport was enlarged, the new claims of the reduced county and the enlarged borough to the compensation which the grant affords obviously were based on new sets of facts and figure. The Minister, surveying the altered scene, had to make a new adjustment. He might (and, as we know, did) come to the conclusion that, in order to do justice between the two sets of

ratepayers, the sum to be allotted to the reduced county must be less in total amount than that previously allotted to the unreduced county. To that extent the income of the county will be reduced. The legislature has thought it prudent to warn the arbitrator that when he weighs in the scales the "would have been" and the "will be" burdens, he must not take into account any alteration made in the grant in consequence of the Minister's new apportionment, whether by way of increase or decrease. The reason for this warning is plain. If the arbitrator sought to compensate the ratepayers for a reduction in the grant, he would be giving back to them what the Minister has, in justice, taken away. If he regarded them as profiting by an increase in the grant, and so weighed the increase in the scales against them, he would be depriving them of what the Minister has thought it right to give them.

So far there is no dispute between the parties. The controversy begins when the appellants say that the arbitrator must assume that the grant to the reduced county will be the same in amount as the grant which was made to the unreduced county. They would read the negative provision that "no alteration of income in consequence of an apportionment . . . shall be taken into account" as if it were equivalent to a positive provision that the arbitrator must make his calculations on the footing that the amount allotted to the reduced county will remain the same as that which was allotted to the unreduced county. My Lords, I do not read the proviso as giving any such direction to the arbitrator, nor do I find anything in the Act which compels him to make the assumption which the appellants would have him make. If he were compelled to assume that there had been no change in the amount of the grant to the county, he would be upsetting the Minister's adjustment of the balance just as surely as if he did what the proviso in terms forbids him to do. A simple illustration will, I think, show this. Let it be assumed that a particularly necessitous area has been severed from a county, with the result that in the reduced county there is a relatively low number of unemployed persons in proportion to the population, whereas in the unreduced county the proportion of unemployment was high. Assume further that in all other respects the county was equally grant-worthy (I borrow a word that was coined, I think, by one of the learned counsel) before and after the severance. The result would be that the reduced county must receive a relatively lower grant than the unreduced county received.

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It would be manifestly wrong to say that the ratepayers of the reduced county had suffered by the change. They are getting what their present needs entitle them to get just as they got in the past what their previous needs entitled them to get. There is no addition to their burden by reason of the reduction in the grant: it is reduced in order that the burden upon them may, so far as is possible, remain unchanged. If, however, the arbitrator is forced to make the false assumption that the ratepayers will continue to get the benefit of the higher grant which the unreduced county received, he will be compelled to do them an injustice, because he will be assuming that the "will be" burden is to be reduced to an extent to which it will certainly not be reduced, and will thus be weighting the scales unfairly against them. Since the arbitrator's duty is to arrive at a sum which "seems equitable," it cannot have been the intention of Parliament that he should be compelled to do an injustice which, be it observed, it would not be the business of the Minister to remedy.

Before coming to a final conclusion on this matter, I had the advantage of reading the opinion which my noble and learned friend Lord Normand is about to deliver. I have found it illuminating, and I agree with his view that the arbitrator would act fairly if he left the grant out of his calculation altogether. It is used as a means of redressing inequalities, and, if properly adjusted, will redress them, and do no more than redress them, however much it may be altered in consequence of an alteration of boundaries. The method adopted by the Court of Appeal reaches the same result, as Lord Normand points out, by treating a proportion of the unaltered grant as referable to the ratepayers of the reduced county. I agree that this is not a strictly accurate way of stating the position. The inaccuracy is, however, a matter of language rather than of substance. The appellants' method of calculation, on the other hand, seems to me to be fundamentally unsound, and to be incompatible with the manifest intention of the legislature. It follows, in my opinion, that the arbitrator must be precluded from adopting it. It is not necessary, however, that he should adopt any particular arithmetical formula, provided that he founds his estimate on correct principles, and I concur in the motion proposed by my noble and learned friend on the woolsack.

LORD NORMAND. My Lords, I agree that the appeal should

be disposed of as proposed by the noble and learned Viscount on the woolsack. Since the facts and the statutory provisions have been sufficiently stated I will not take up time by repeating them. The first question is, what is the nature of the arbitrator's duty under the statute. This question was not raised in the courts below and it is unfortunate that we do not have their opinions upon it. I think, however, that the answer is clear beyond reasonable doubt and that the arbitrator's duty under s. 151 and s. 152, sub-s. 1 (b) and the rules in sch. V of the Local Government Act, 1933, is to award to the county which is suffering the severance the payment from the annexing borough of such a sum as he in his discretion thinks equitable having regard to all the circumstances including the increase of burden which will be thrown on the ratepayers of the reduced county as a consequence of the alteration of boundaries. I refer to the expression "such sum as seems equitable" in s. 152, sub-s. 1 (b), and to the expression "regard shall be had to" in r. 1 of sch. V, both of which seem to me to be free of ambiguity. It is clear too that the cost of executing the reduced county's functions after the alteration of boundaries and the length of time during which the increase of burden may be expected to continue (r. 1 (b)) are at best matters of approximate estimate, and that the average increase of annual burden (see r. 2), which appears to mean normal annual increase of burden, is to some extent a matter of speculation. What is required of the arbitrator, therefore, is the fair exercise of a wise discretion rather than arithmetical calculations. It is nevertheless necessary that the arbitrator should know what are the factors to which he must have regard under r. 1 of sch. V, though the effect, if any, which he may decide to give to them is subject to his discretion. The appellants, the borough of Newport, maintain that the arbitrator, in assessing the increase of burden which will be thrown on the ratepayers of the reduced county as the result of the change of boundaries, must take account of the general exchequer grant and must assume that during all the years after severance, to which he is directed by r. 2 to have regard, the county will continue to receive the same sum as general exchequer grant as that which it received immediately before the severance. The respondents the county council, on the other hand maintain that the exchequer grant should be altogether ignored. or (what comes arithmetically to the same thing) that the arbitrator should assume that the county will receive after the date of severance

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only such proportion of the pre-severance general exchequer grant as the rateable value of the reduced county bears to the rateable value of the county before severance. I must, however, here interpose the criticism that the assumption that the county after severance will receive a proportion of the pre-severance general exchequer grant does violence to the true nature of such a grant. For it is a grant to the county council and part of its income and is in no sense apportionable between different parts of the county.

If, for the purpose of assessing "the increase of burden" under s. 152, sub-s. 1 (b) and the rules of sch. V, it were necessary to know what the reduced county's general exchequer grant will be after severance there would be no difficulty. The figure has been adjusted under the provisions of s. 152, sub-s. 1 (a), and the regulations therein mentioned and it would only be necessary to use the adjusted figure. But the proviso to r. 1 of sch. V expressly forbids the arbitrator to take into account any alteration of the county council's income in consequence of an apportionment made under the regulations mentioned in s. 152, sub-s. 1 (a). When the case was before the Court of Appeal it seems to have been thought that the proviso imposed an artificial prohibition on the arbitrator, but the parties are now agreed, I think rightly, that the proviso merely warns the arbitrator off ground which is not properly within his sphere. It is an express admonition that the adjustment of general exchequer grant which is made at severance is irrelevant, and it is not the capricious exclusion from consideration of a relevant factor. The adjustment is irrelevant because it is not related to the "increased burden" nor to the loss of rateable value in the severed area, and in so far as the arbitrator might take account of it in assessing the compensation to the county for "the increased burden" he would to that extent be nullifying the effect of the adjustment. The prohibition in the proviso ought not, in my opinion, to be extended by implication beyond the limits expressed in it, nor should it be construed as implying a positive direction to take account of the pre-severance income of the county council, including the general exchequer grant, as if it were to be received unaltered in amount after the severance. The relevance or irrelevance to the arbitrator's task of the pre-severance general exchequer grant must depend on other statutory provisions and particularly on the terms of r. 1 (a) of sch. V. But in construing that rule it is proper and

necessary to bear in mind the terms of the proviso. The first thing that the arbitrator must do under the rule is to find what the burden of the ratepayers in the reduced county will be, but he must in doing so not take into account the exchequer grant which will be paid to the county after severance. The question then arises on what grounds of logic is it permitted to take into account an exchequer grant which the county will not receive in the relevant period? To put the point less abstractly how can the arbitrator, in having regard to what *will* be, take account of a grant which he knows *will not be* received? The statute might compel the arbitrator to an illogical inclusion of what he knows to be unreal and fictitious in a calculation which aims at being real, or as real as anything in the future can be said to be real. But I do not find in the rule nor elsewhere in the statute any warrant for this departure from logic which the appellants demand. It is not only illogical to include in a calculation of what will be something that will not be, but it is also irrational to assume that a county which has suffered severance of territory will retain the whole of its pre-severance general exchequer grant, with the consequence that if the severed area is sufficiently large and however high its rateable value may be in comparison with the rateable value of the rest of the county, the general exchequer grant to be received by the county council will exceed the expenditure of the reduced county, and the reduced county ratepayers will find that their burden has been extinguished. I therefore reject the contention for the appellants that the arbitrator must calculate the burden which will be borne by the ratepayers on the assumption that the pre-severance general exchequer grant will continue to be received after severance. In the calculation of the burden which would have been borne by the ratepayers if there had been no alteration of boundaries it is again necessary, since like must be compared with like, that the arbitrator should not assume the continuance of the pre-severance general exchequer grant. In my opinion the arbitrator's mandate requires him to perform the very simple operation of finding the difference between the burden of the ratepayers in the reduced area in the post-severance period and the burden which they would have borne in the same period if there had been no severance, and in doing so not to assume any figure, neither the real figure nor a fictitious figure, for post-severance general exchequer grant. Lord Greene M.R. has shown in his judgment (1) one simple way in which this

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can be done, and he arrived at the same result as that at which he finally arrived by assuming that after severance the county council would receive a reduced proportion of the pre-severance general exchequer grant. But it may be repeated here that the arbitrator is not to allow himself to become the victim of arithmetic. He has been given a broad and rather a blunt axe with instructions to exercise a wise and fair discretion in using it, and he must do his best with the clumsy instrument which the legislature has put into his hands.

There was some discussion whether the arbitrator could legitimately have regard to the fact that about two years after severance a new fixed grant period would begin and a new general exchequer grant would be assigned to the county. I think that this point is not included in the question agreed to by the parties. In my opinion, however, it would be erroneous to take this later adjustment of general exchequer grant into account. Any new adjustment after the adjustment made at severance is not related even remotely to "the increase of "burden" caused by the severance and any such later adjustment would be based upon considerations which had emerged after the adjustment made at severance.

Appeal dismissed in the terms proposed by Viscount Simon.

MONMOUTHSHIRE COUNTY COUNCIL v. NEWPORT BOROUGH COUNCIL.

VISCOUNT SIMON. My Lords, the Newport Extension Act, 1934, transferred to the borough of Newport an area previously forming part of the administrative county of Monmouthshire and the appointed day on which the transfer took effect was April 1, 1935. In view of this alteration of boundaries an adjustment of "property income debts liabilities or expenses or "of . . . financial relations" (s. 58, sub-s. 1, of the Act) was required, and, since these included matters on which the two local authorities did not agree, an arbitrator was appointed to make an award. It is not disputed that a proper adjustment will require the award of a net amount to be paid by the borough (the respondents in this appeal) to the county (the appellants in this appeal). This appeal concerns the second and third questions raised in the consultative case stated for the opinion of the court by the arbitrator. Of these two questions the first is "whether I have power to award interest on any

"sum or sums I may award to the county council—(a) in respect of the period between the appointed day and the date of my award, or (b) in respect of any, and if so what, part of that period." A further question is formulated which only arises if the first question is answered in the affirmative. The way in which the question arises is best seen by examining the appellant's summary of its claim, which was delivered in November, 1938. The claim amounted, in round figures, to a sum of 539,000*l.* gross, against which is set off about 7,000*l.* admittedly due on certain items of adjustment to the respondent borough, thus leaving a net sum of 532,000*l.* as an annual figure claimed by the appellant, the county council. The main head of claim was for adjustment in respect of increase of burden (the proper calculation of which is the subject of the previous appeal), but there are also two smaller heads in respect of continuing liabilities and of capital liabilities. To the total of 532,000*l.* the appellant claims that the arbitrator should add interest on this sum at 4 per cent. per annum from the appointed day to date of payment.

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The argument for the appellant is that, whereas the figure fixed by the arbitrator in place of the 532,000*l.* claimed would be the proper figure to take if payment was made on the appointed day, this amount becomes inadequate if payment is made long afterwards, unless the arbitrator has a discretion to add a further sum to compensate for the interval during which the appellants have had to wait for payment. The appellant admits (as the question implies) that the arbitrator is not bound to add this compensation; for the delay, or some part of it, may be due to the claimant's fault, but it urges that the arbitrator has this discretion, and points to the fact that the largest item to be quantified is such "as seems equitable." Like the Court of Appeal, I cannot accept this view.

As regards the adjustment for increase of burden, s. 152, sub-s. 1 (b) of the Local Government Act, 1933, provides that on such an adjustment "provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in sch. V to this Act in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers" of the reduced area which is now the county. The equitable sum to be fixed in order to reach the adjustment in respect of

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increase of burden on ratepayers, is therefore to be arrived at by considering what increase of burden may be brought about "as a consequence of any alteration of boundaries or other "change in relation to which the adjustment takes place." The alteration of boundaries takes place on the appointed day. To arrive at this figure (which involves the difficult task of estimating the difference between what will be the result of the change of boundaries to ratepayers in the reduced area and what would have been in the future the financial situation in that area if there had been no change), the arbitrator must fix what he regards as equitable in view of the change which takes place on the appointed day. His mandate does not extend to authorize him to measure and award what it would be equitable to add for delay in payment. That is quite another matter. If the county has any grievance on that score, any remedy (if one exists) must be found elsewhere than in the arbitrator's award. This view of the matter seems clearly to emerge from an examination of the statutory terms of reference.

As regards items in the claim other than that of adjustment in respect of increase of burden, the arbitrator, in my opinion, is not authorized to add a rate of interest for delay. It may be that in some instances the county would, by another process, get a further amount because the settlement prescribed by the arbitrator is not, in fact, carried out till long after the appointed day, but this relief would not, in any case, be provided in the arbitrator's award. For example, if before the boundaries were altered the two authorities shared expenses or profits of a joint enterprise in a certain proportion and if the arbitrator awarded that this proportion should be varied as at the appointed day, I should suppose that the authority which from the appointed day to the date of putting the award into force had borne too much would be entitled to have this rectified in taking the final account. But the rectification would not be arrived at by calculating a rate of interest but by applying the adjustment decided in the arbitrator's award as from the appointed day.

It is argued for the appellants that sub-s. 3 of s. 151 of the Local Government Act, 1933, which section is also imported into s. 58, sub-s. 1, of the Newport Extension Act as a guide for the carrying out of the adjustment, authorizes the arbitrator, when the adjustment is not agreed, to "provide for any matter "for which an agreement might have provided." Local bodies, when agreeing an adjusting figure, have not infrequently

conceded to the receiving party an amount for interest in view of delay in payment (see, for example, the agreed adjustment in *Bullington Rural District Council v. Oxford Corporation* (1); *Southport Corporation v. Lancashire County Council* (2)). Hence, it is suggested, the arbitrator has equally wide powers. But when the local bodies agree that interest should be paid, this is apart from the powers contained in s. 151, and the arbitrator's authority extends only to matters which, if agreed, might be settled under the statute.

There is, as it appears to me, a shorter road by which to reach the conclusion that the arbitrator cannot add interest in the way proposed by the appellants, in its summary of claim. The figure of claim in that summary, or any figure substituted by the arbitrator for it, is (at any rate, for the most part), a figure of annual loss. So far as increase of burden is concerned, it is certainly a figure for the year. What the arbitrator would award as due to the county would not be this figure itself but this figure to be paid by way of annuity, or the capitalized value of the annuity, subject to the ceiling prescribed by r. 2. It would, therefore, be plainly wrong to add to this annual figure interest at 4 per cent. and to direct an annuity to be paid on this higher basis or the capitalized value of such annuity, for the suggested addition of interest is only in respect of a period of delay in payment at the beginning. Once the arbitrator has fixed the sum, whether as an annuity for so many years or as a figure of capital, the county can sue for it, and if payment was delayed after the due amount had been ascertained, interest might be added under the Law Reform (Miscellaneous Provisions) Act, 1934. In neither event does the element of loss falling on the council by reason of delay in payment arise as a consequence of the alteration of boundaries. I move that this appeal be dismissed.

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LORD WRIGHT. My Lords, the subject of the second appeal, to which the parties are the same two councils as in the first appeal, and which was included in the same special case and heard before the courts below and before your Lordships immediately after the principal matters had been dealt with, raises the question whether the arbitrator has power to award interest in addition to whatever capital sum he awards. There was very great delay in the proceedings between the parties. The Newport Extension Act was passed in 1934. Under it the

(1) [1936] 3 All E. R. 875.

(2) [1937] 2 K. B. 589.

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appointed day was April 1, 1935, when the Act came into force. The claim of the county council, the appellants in this separate appeal, was not delivered until November, 1938. It was not until June 7, 1943, that the arbitrator was appointed by the agreement of that date between the parties. The special case was dated October 11, 1945. The judgment of the learned judge was delivered on December 19, 1945, and of the Court of Appeal on June 5, 1946. Your Lordships have been engaged in hearing this appeal in February, 1947. The sum claimed was very large. If interest were given for a sum less than the amount claimed, it still would be a very large sum, which Lord Greene M.R., when giving the judgment of the court said (1) would be in the neighbourhood of a quarter of a million pounds. It is not suggested that responsibility for this delay rests on either party. It would certainly be a great hardship if when the award is finally made the weight of a very heavy claim for interest should be added to the principal sum. In addition it has been questioned if to raise any such sum would be within the powers of the borough. But, however that may be and however grave such consequences could be, they could not furnish a ground against the allowance of interest if to allow interest were within the arbitrator's competence, and he thought it proper so to do. Both courts below have decided against the claim for interest.

The question laid before the arbitrator was stated by him in the following alternatives as a question of law. " (2.) Whether " I have power to order interest to be paid on any sum I may " award to the county council (3.) If I have power to " award interest, whether that interest is to be taken into " account for the purpose of para. 2 of sch. V to the Local " Government Act, 1933." The issue whether he has power to award interest can only be determined by examining the language used by the legislature with reference to the matter. I agree with both courts below and with (as I understand) all your Lordships that the authority or mandate given to the arbitrator by the legislature does not expressly or by implication include this power. The arbitrator's power is defined by s. 58 of the Newport Extension Act, 1934, and s. 151, sub-s. 3, and sch. V to the Local Government Act, 1933, the terms of which are fully before your Lordships. There is no express mention of interest in these enactments. They provide for a financial adjustment which may be settled by

(1) 175 L. T. 293, 302.

agreement but in default of an agreement as to any matter requiring adjustment, it is provided that "such adjustment" shall be referred to the arbitration of a single arbitrator "and the award of the arbitrator may provide for any matter" for which an agreement might have provided." But the governing section defining the scope of the financial adjustment is s. 152 of the Act of 1933. This as appears from the language of the section already quoted in this opinion is to adjust the amount of the increase of burden which in consequence of the alteration of boundaries will properly be thrown on the rate-payers of the area of the local authority in meeting the cost incurred by that local authority in the discharge of their functions. This limitation is made even clearer by sch. V and particularly by r. 2 of the schedule which provides that the sum payable by the local authority in respect of the increase of burden shall not exceed the average annual increase of burden or its capitalized value if payable by instalments. In my opinion this precise definition of the mandate thus given to the arbitrator excludes the idea of a power to award interest in addition to his determination of the increase of burden. The English common law as to interest has very recently been discussed by your Lordships in the case of *Riches v. Westminster Bank* (1). In that case this House discussed the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which by sub-s. 1, enlarged the powers of "any court of record" "in any proceedings for the recovery of" "any debt or damages" so as to empower the court to include in the sum for which judgment is given interest and by sub-s. 3 repealed ss. 28 and 29 of the Civil Procedure Act, 1833. The mere language of the new Act makes it clear that it cannot apply to an award under the provisions of the Local Government Act here in question. There is here no question of debt or damages, nor is the decision that of a court of record. The judgment of this House in *Swift & Co. v. Board of Trade* (2), which was cited in this appeal was a different case. It dealt with the power of a statutory arbitrator to allow interest on compensation for goods requisitioned in war-time under the Defence of the Realm Regulations. Such a power was negatived by this House. Much of what was said by their Lordships in that case does not apply to a case like the present in particular because the Act of 1934 just mentioned had not then been enacted. But Lord Sumner (3) stated the principle

(1) Ante p. 390.

(2) [1925] A. C. 520.

(3) Ibid. 548.

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to be that " unless the regulation itself authorizes the allowance " of interest none can be given." He pointed out that there was no debt due and no wrong done ; there was nothing to which to attach an allowance of interest. He concluded : " To give interest is really to give additional compensation for " being the victim of war legislation, and this subject of " compensation is not within the regulation." Mutatis mutandis, the principle so stated applies to the present case. Indeed, the reasons here for denying the discretion of the statutory arbitrator to award interest are stronger than those indicated by Lord Sumner. Even though the appellant council was not the victim of war-time legislation it and the respondent council were both subjected to the provisions of ss. 141 and 152 and to the statutory arbitration, with its inevitable delay in determining the proper sum of compensation. It may be enough to say here that no express power is given to the arbitrator to award interest. But the matter is to my mind concluded by the form of the mandate to which I have adverted. On the footing that interest was outside the scope of the arbitrator's authority that defect could not be cured by the agreement of the parties which, in a case like this, could not enlarge the statutory jurisdiction. To meet these objections it has been strenuously contended that loss of interest which was unavoidable under the circumstances was an integral and essential element in the equitable estimate of the increase of burden consequent on the alteration of boundaries and as such had to be taken into account, like any other element of cost. But it cannot be correctly regarded as part of the increase of cost to the county council in executing its functions. It is, indeed, outside that subject of computation. Interest is collateral, because it is in essence a special payment to compensate the creditor for being deprived of the use of the money during the delay between the due date and the eventual payment. It is the appointed day which the arbitrator must regard as the due date for fixing the compensation. The delay in payment is subsequent and incidental. But the fundamental objection is that the arbitrator's mandate does not extend to the award of interest. That legal limitation excludes the equitable considerations, at the best uncertain and open to conflicting equities, which the county council seeks to introduce. I have not been helped by any of the other cases cited. The issue should, in my opinion, be decided on the basis of the particular instruments to which I have referred. I should answer Question (2.) in the negative. Question (3.) does

not arise since it presupposes an affirmative answer to (2.). Of course, the question as to interest from the date of the award is a different matter. It is naturally not raised in the case. I would dismiss the appeal.

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LORD SIMONDS. My Lords, the relevant facts have been sufficiently stated in the other appeal between these parties. Here the short question stated by the arbitrator for the opinion of the court is, in his own words, "whether I have power to "award interest on any sum or sums I may award to the county "council (a) in respect of the period between the appointed day "and the date of my award, or (b) in respect of any and, if so "what, part of that period." A further question arises, if the question is answered in the affirmative. It does not arise in the view which your Lordships take. It is necessary to distinguish that part of the sum to be awarded which arises from an adjustment in respect of increase of burden from that part which arises from an adjustment of other "property income, "debts, liabilities and expenses (so far as affected by the "alteration) of, and any financial relations between, the parties "to the agreement." I quote the language of s. 151, sub-s. 1, of the Local Government Act, 1933. It is in regard to the former part only (which forms by far the larger portion of the claim) that the specific directions contained in s. 152, sub-s. 1, of the Act and in sch. V to the Act apply. It appears to me that the answer to this question must rest on the true construction of the relevant sections. I find that so clear that I do not think it necessary to refer to the adventitious fact (if it be a fact) that the borough council has no statutory power to raise by way of loan the very large sum which might be awarded by way of interest. As a matter of construction there must be found in the section a power express or implied given to the arbitrator to award interest. On this part of the case I would respectfully adopt the language of Lord Greene M.R. I agree with him in thinking that the decision of this House in *Swift & Co. v. Board of Trade* (1) is conclusive. No express power is to be found in the section and there is nothing from which such a power can or ought to be implied.

It was urged that so far as the awarded sum consisted of an adjustment in respect of an increase of burden, it was the duty of the arbitrator to ascertain under s. 152, sub-s. 1 (b) "such "sum as seems equitable," etc., and that he could not satis-

(1) [1925] A. C. 520.

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factorily perform that duty unless he could award interest for delay in payment after the appointed day, when ex hypothesi, the burden was increased. But this argument ignores that what the arbitrator has to do is to find the equitable sum as at the appointed day. Having done so, he has accomplished his task. He has neither the right nor the duty then to consider whether there has been delay and, if so, whose fault that delay was, and upon that footing to award interest.

Then it was contended, and this argument extended, I think, to the whole of the awarded sum, that the arbitrator could award whatever the parties could agree, and that the parties could in the adjustment of their "financial relations" agree to the payment of interest on a capital sum. I will assume that the first part of this contention is correct, that, what the parties could agree, the arbitrator could award. But the "financial relations" to be adjusted are the relations existing before and at the appointed day: see per Lord Davey in *Caterham Urban District Council v. Godstone Rural District Council* (1). An agreement for payment of interest after the appointed day is not an adjustment of financial relations as at that day. If it is competent for a local authority to agree to pay such interest (a question which I do not think it necessary to decide) the power to do so does not arise under the sections in question but extraneously. And if it does not arise under the sections, then the arbitrator has no power to award interest on any sum which he may award to the county council. This appeal must, in my opinion, be dismissed.

LORD NORMAND. My Lords, I have been asked by my noble and learned friend, LORD DU PARCQ, to state on his behalf that he has had an opportunity of reading in print the speech which was delivered by my noble and learned friend on the woolsack, and that he agrees with it and has nothing to add. My Lords, I also agree with it, and I have nothing to add.

Appeal dismissed.

Solicitors for the borough council: *Rees & Freres, for T. Mervyn Jones, Newport, Mon.*

Solicitors for county council: *Torr & Co., for Vernon Lawrence, Newport, Mon.*

POINTE GOURDE QUARRYING AND
TRANSPORT COMPANY, LIMITED . APPELLANTS ;

AND

SUB-INTENDENT OF CROWN LANDS . RESPONDENT.

J. C.*

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July 29.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD
AND TOBAGO.

Trinidad and Tobago—Land (quarry)—Compulsory acquisition—Construction of naval base nearby—"Special suitability or adaptability of the land for any purpose"—"Purpose" to which the land can be applied—Enhanced value due to scheme to construct naval base—To be disregarded in assessing compensation—Land Acquisition Ordinance, No. 14 of 1941, s. 11, sub-s. 2.

The Crown, pursuant to the provisions of the Land Acquisition Ordinance, 1941, compulsorily acquired certain lands owned by the appellants at Pointe Gourde, in Trinidad, which were required by the United States of America in connexion with the establishment of a naval base in Trinidad. On part of the land there was a large quantity of limestone which, before the acquisition, the appellants had quarried and sold. A sum of \$15,000, part of the total compensation awarded, related to the special adaptability which the quarry land possessed after acquisition because its proximity to the naval base under construction made it specially suited to the special needs of the United States :—

Held, first, that in sub-s. 2 of s. 11 of the Land Acquisition Ordinance, which provides that "the special suitability or "adaptability of the land for any purpose shall not be taken "into account" in awarding compensation on compulsory acquisition "if that purpose is a purpose to which it could be "applied only in pursuance of statutory powers," the word "purpose"—which it must be assumed is used throughout the sub-section in the same sense—is employed as meaning a purpose to which *the land* can be applied. It connotes a use, actual or potential, of the land itself, and cannot be regarded as meaning a purpose which is only concerned with the use of the products of the land elsewhere. Accordingly, the use of the quarried stone in the construction of the naval base, though of particular importance to the United States on account of their special needs, did not constitute in itself a "special suitability or "adaptability of the land for any purpose" within the meaning of the sub-section, which had therefore no application to the item of \$15,000.

* *Present* : LORD OAKSEY, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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Held, secondly, however, that that part of the award could not stand, since compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.

South Eastern Railway v. London County Council [1915] 2 Ch. 252, at 258, referred to.

Judgment of the Supreme Court of Trinidad and Tobago affirmed in the result.

APPEAL (No. 42 of 1946) from a judgment of the Full Court of the Supreme Court of Trinidad and Tobago (June 23, 1945) on a case stated by Hallinan J., and from an order of the Supreme Court (Hallinan J.) (June 30, 1945), which gave effect to the judgment of the Full Court.

The following facts are taken from the judgment of the Judicial Committee. This matter came before the Board on appeal from the judgment of the Full Court of the Supreme Court of Trinidad and Tobago (Blackall C.J., Brown and Mathieu-Perez JJ.) on a case stated by Hallinan J. concerning the compensation to be paid by the respondent to the appellants in respect of the compulsory acquisition of certain lands in the Island of Trinidad; and from a consequential order by Hallinan J. which gave effect to that judgment.

By an agreement of March 27, 1941, His Majesty's Government in the United Kingdom agreed with the United States, inter alia, to lease to the United States land required for the establishment of naval and military bases. The United States required for the establishment of a naval base in Trinidad certain lands owned by the appellants at Pointe Gourde in that Island. Pursuant to the agreement just mentioned the Crown, on April 22, 1941, acquired those lands in the exercise of its compulsory powers. Those powers and the relevant provisions for the assessment of compensation were to be found in the Land Acquisition Ordinance, 1941, as since amended.

On part of the lands so acquired there was a large quantity of good limestone. The appellants had quarried and sold stone and lime from that part for many years before the acquisition. The quarry land thus worked had access to smooth water and that made for the easy transport by lighter of its products to market. In paragraphs (B), (C) and (D) of cl. 5 of the case stated there were certain findings regarding that quarry land which must be set out in extenso. They read as follows: "(B) The quarry land had a special suitability

" or adaptability for the purpose of producing and marketing
 " quarry products, and had a market value as quarry land
 " prior to the date of acquisition. (c) The United States had
 " special need of a large quantity of stone for the construction
 " of the naval base at Chaguaramas, Trinidad. In addition
 " to the special adaptability of the quarry land referred to in
 " the preceding paragraph, the proximity of the quarry land
 " to the base under construction made that land especially
 " suited to the United States special needs. (d) The quarry
 " business carried on by the plaintiffs was totally extinguished
 " by acquisition. In awarding compensation in respect of this
 " business, the tribunal was largely guided by the estimate it
 " formed of the prospective profits. The tribunal considered
 " that the market value of the quarry land and business
 " would be increased if the United States needs were supplied
 " from this quarry land on a commercial basis as greater
 " prospective profits might be expected."

The appellants' claim for compensation was heard, pursuant to the provisions of the Ordinance, by a tribunal constituted by Hallinan J. sitting with two assessors. The total award was for \$101,000. The present proceedings related exclusively to the sum of \$15,000, part of that amount, which the tribunal allowed in respect of one particular item. The balance of \$86,000 included the value of the quarry as a going concern, and it was beyond question that that figure made due allowance for the " special suitability or adaptability " of the land for the purpose of a quarry, which was referred to in cl. 5 (B) of the case stated. The award of \$15,000 with which this appeal is concerned also related to the quarry land and was described by the tribunal as being " for special " adaptability." But, despite the similarity of description, it was clear that that item was intended to be quite different and distinct from any other in the compensation allowed. It was meant to cover what was referred to in cl. 5 (c) of the case stated. It related, not to the special suitability or adaptability of the land for the purpose of quarrying, which existed before acquisition, but to the special adaptability (to follow the language of the tribunal) which the quarry land possessed after acquisition, in that its proximity to the naval base under construction made it specially suited to the special needs of the United States. As cl. 5 (D) of the case stated showed, the tribunal considered it likely that those needs would have increased the quarry profits had the undertaking remained in

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the hands of the appellants, and the sum of \$15,000 was evidently awarded as the measure of the loss of that element of prospective extra profit.

No question of amount arose. The point for determination was whether or not that \$15,000 item was allowable in law as part of the compensation payable to the appellants. Before the tribunal that question was regarded as involving the construction of sub-s. 2 of s. II of the Ordinance of 1941, which read :—" (2.) The special suitability or adaptability of " the land for any purpose shall not be taken into account " if that purpose is a purpose to which it could be applied " only in pursuance of statutory powers, or for which there is " no market apart from the special needs of a particular " purchaser or the requirements of the Government or the " Government of the United Kingdom or any department " of either of such Governments or any local or public " authority." Hallinan J. apparently took the view that the item under consideration fell within the opening words of that sub-section but was not excluded by its subsequent provisions, and he stated the question for the Full Court thus :—" Whether sub-s. 2 of s. II of the Land Acquisition " Ordinance, 1941, applies to the circumstances of this case " so as to prevent the special adaptability of the plaintiffs' " land to meet the special needs of the United States being " taken into account." The Full Court answered that question in the affirmative, disallowed the sum of \$15,000 awarded for " special adaptability " and remitted the matter to Hallinan J. to be dealt with accordingly.

1947. July 10, 11. *Capewell K.C.* and *Squibb* for the appellants. The question is whether sub-s. 2 of s. II of the Land Acquisition Ordinance, 1941, of Trinidad—the parent Act is the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 2, sub-s. 3, and the words of the Trinidad Ordinance are substantially the same—has any application to the facts of this case, and, if it has, whether it has in fact been correctly applied. The sub-section has no application to the facts here, and the appellants are asking for the whole of the original award—that the extra \$15,000 should be included. The purpose of producing and marketing quarry products was a purpose for which there was a market apart from the special needs of the United States, and the purpose for which it was acquired was a continuation of the

existing use. The project of a naval base being in existence, the value of the quarry was bound to have risen whether it was acquired or not. It was valued as a going concern by capitalizing the profits as shown by past accounts and taking into account the fact that increased profits would have been made by selling stone for the naval base if the land had not been acquired. The submission is that the extra profits which the quarry would have thus earned on the ground of its proximity to the naval base were a matter which the assessing tribunal was entitled to take into account in awarding compensation for the value of the land taken. The respondent contends that the extra profits arose only from the special suitability of the quarry because of its proximity to the site of the naval base and was therefore not an element which could be taken into account in assessing compensation because it was expressly excluded by the provisions of sub-s. 2 of s. 11 of the Ordinance. The appellants contend that special suitability does not arise where, as here, there is a market for the land or its products apart from the special needs of the acquiring authority. The special needs of the United States were of the same nature as the needs of the other customers of the appellants. The United States did not need the land, but the products of the land, and therefore their special needs were not the special needs of a particular purchaser of the land within the meaning of s. 11, sub-s. 2, of the Ordinance. With regard to the authorities, *Inland Revenue Commissioners v. Clay* (1) states the principle of assessing compensation before the passing of the Act of 1919. [Reference was also made to Balfour Browne on The Law of Compensation, 2nd ed., pp. 659, 663, 669; *Sidney v. North Eastern Ry.* (2), where it was said that "special adaptability is nothing more than an element of "market value"; *In re Lucas and Chesterfield Gas and Water Board* (3), which dealt with "peculiar adaptability"; *Cedars Rapids Manufacturing and Power Co. v. Lacoste* (4), where there is a re-statement by the Privy Council of the principles which have been laid down; *Fraser v. Fraserville (City of)* (5) and *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam* (6).] Sub-s. 2 of s. 11 should be read "the special suitability or adaptability of the land for any

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(1) [1914] 3 K. B. 466, 479, et seq.

(2) [1914] 3 K. B. 629, 636, 640.

(3) [1909] 1 K. B. 16, 24.

(4) [1914] A. C. 569, 576.

(5) [1917] A. C. 187, 194.

(6) [1939] A. C. 302.

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"purpose shall not be taken into account if that purpose is
"a purpose *for which there is no need apart from the need of*
"*the particular purchaser,*" —the special purpose shall not be
taken into account if there is no market apart from the special
needs of the particular purchaser, but here there was such
a market.

Sir David Maxwell Fyfe K.C. and *Gahan* for the respondent,
examined first the principles governing the compulsory
acquisition of land before the Act of 1919 was passed, and
secondly, the effect of *Clay's* case (1) on that position. It was
essential that the Act of 1919 should make clear that the
reasoning in *Clay's* case (1) did not apply, and it was, it is
submitted, determined to go as far, and a little further, than
the principles dealing with the acquisition of land had gone
before *Clay's* case (1) had disturbed the waters. In these
circumstances it is submitted that "suitability" and
"adaptability" connote the capability of the land as distinct
from the actual user. It is important to emphasize the three
sections in which the assessment tribunal dealt with the
value of this property. They first made an allowance for the
value of the going concern, and then they dealt with future
profits, so the appellants are receiving the value of their
quarry as a commercial proposition on the basis of its past
use and past profits and also on its possible future develop-
ment: there is no dispute about those matters. Then comes
the third finding, the \$15,000 for "special adaptability," and
the only dispute in this case arises on that. It is submitted
that the trial judge really posed the wrong question to him-
self and his assessors where he says "but in the present case,
"the special needs of the United States Authorities did not
"cause the lands taken to be used as a quarry; the quarry
"already had a market value. All that the needs of the
"United States Authorities did was to give the quarry an
"increased market value in view of the quarry's special
"adaptability to those needs." That is not the question in
this case: the true question for determination depends on two
facts, (a) that the quarry lands were specially suitable not
only for the normal commercial purposes as a quarry, but also
for exploitation by the naval base, and (b) they were specially
conveniently situated for the naval base. Those are the
important matters. The point is not that the special needs
of the United States did not cause the land to be used as

(1) [1914] 3 K. B. 466, 472, et seq.

a quarry, that is conceded, but that the special needs of the United States gave to the quarry the special value which depended first of all on their urgent needs for construction of the base, and secondly, on the proximity and special position of the quarry part of the quarry lands to the site of the base. There is no market, apart from the special needs of the naval base, for that suitability to be able to work near the naval base: that is a purpose for which there is no market apart from the special needs of the naval base. If the trial judge is right in his finding as to special suitability, then it is submitted that that is a suitability which is excluded by the section. There are two suitabilities, (i.) quarrying simpliciter, and (ii.) quarrying for the urgent needs of the base. Once it is predicated that there is a finding of this second suitability, then that is one for which there is no market apart from the needs of the particular purchaser—the United States. [Reference was made to Cripps on Compensation, 8th ed., p. 182—"increase in value due to user by promoter to be "disregarded"; and to *South Eastern Ry. v. London County Council* (1).]

Capewell K.C. replied.

July 29. The judgment of their Lordships was delivered by LORD MACDERMOTT, who stated the facts set out above and continued: In its material terms, s. 11, sub-s. 2, of the Ordinance reproduces s. 2, sub-s. 3, of the Acquisition of Land (Assessment of Compensation) Act, 1919, which, there can be little doubt, was designed to modify the effect of certain decisions of the courts relating to the quantum of compensation in cases of compulsory purchase. Their Lordships, however, do not find it necessary to discuss the historical background of this legislation as its applicability to the somewhat peculiar situation presented by this appeal turns, in their opinion, on the actual wording of the enactment.

It is, of course, possible that land may have a special suitability or adaptability for several purposes, and, where this is so, it may well happen that s. 11, sub-s. 2, will operate to exclude compensation in respect of some of such purposes and not in respect of others. But it must be assumed that the word "purpose" is used or referred to throughout the subsection in the same sense. That being so, the expression "if "that purpose is a purpose to which it could be applied only

(1) [1915] 2 Ch. 252.

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"in pursuance of statutory powers" indicates, in their Lordships' view, that the word is employed in the sub-section as meaning a purpose to which *the land* can be applied. It therefore connotes a use, actual or potential, of the land itself, and cannot be regarded as meaning a purpose which is only concerned with the use of the products of the land elsewhere. So, while the use of this land as a quarry manifested a "special suitability or adaptability" for a purpose within the meaning of the sub-section (which on the facts was not excluded thereby from the assessment of compensation) the use of the quarried stone in the construction of the naval base, though of particular importance to the United States on account of their special needs, did not, in the opinion of their Lordships, constitute in itself a "special suitability or adaptability of the land for any purpose" within the meaning of the sub-section. At most it was but a circumstance which added to the value to the United States of the use of the land as a quarry. Their Lordships therefore consider that s. 11, sub-s. 2, of the Ordinance did not apply to the item under discussion when regarded alone, as it must be in this case, and cannot therefore be said to have operated to prevent the value reflected in the award of \$15,000 being taken into account.

It follows from this that the question as submitted to the Full Court should have been answered in the negative. But it does not follow that this part of the award can stand. It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South Eastern Ry. Co. v. London County Council* (1): "Increase in value consequent on the execution of the undertaking for or in connexion with which the purchase is made must be disregarded." This rule was recognized by the Full Court and, indeed, appears to be the basis of its main conclusion, for in the course of his judgment Blackall C.J., after a reference to Lord Buckmaster's statement of the principle in *Fraser v. Fraserville* (2), proceeds: "In the present case, although a value as a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required. In other words, the value was

(1) [1915] 2 Ch. 252, 258.

(2) [1917] A. C. 187, 194.

"enhanced by the scheme of the party acquiring the land, and
 "that is not a factor for which additional compensation may
 "properly be awarded."

On behalf of the appellants it was said that the relevant scheme in this matter was the acquisition of the quarry land and not the construction of the naval base in its vicinity. Their Lordships are unable to accede to this argument. The case stated finds that the lands acquired were "required by
 "the United States for the establishment of a naval base in
 "Trinidad." That being so, the nature of the scheme of this acquisition is clear and the award of \$15,000 can only be related to the additional value which it gave to the quarry land. For these reasons their Lordships consider that the Full Court was right in disallowing the item in question. This determines the substance of the matter in dispute as the appeal cannot be regarded as turning on the answer given to the question of law submitted which was, unfortunately, formulated too narrowly to raise the real issue. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal.

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Solicitors for appellants : *Stafford Clarke & Co.*

Solicitors for respondent : *Burchells.*

[HOUSE OF LORDS]

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LEACHINSKY	RESPONDENT.	Dec. 2, 3, 5, 6, 9, 10.

Criminal law—Arrest—Illegal arrest without warrant—Subsequent justification on ground of reasonable suspicion of felony—Ground not communicated at the time to person arrested—False imprisonment.

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On August 31, 1942, the appellants, who were Liverpool police officers, arrested the respondent at his warehouse in Liverpool, without a warrant. At the time they suspected and had reasonable grounds for suspecting that he had stolen or feloniously received at Leicester a bale of cloth then in the warehouse, but they did not give this as the ground of the arrest, professing instead to arrest

* *Present* : VISCOUNT SIMON, LORD THANKERTON, LORD MACMILLAN,
 LORD SIMONDS and LORD DU PARCQ.

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him on a charge of "unlawful possession" under the Liverpool Corporation Act, 1921, though in the circumstances the Act admittedly gave them no power to arrest without warrant. The respondent was taken to the police station and there detained in custody until the following day, when he was brought before the magistrate on the charge of "unlawful possession," being by him remanded in custody for a week, and subsequently, further remanded on bail on September 8, for a further week. In an action for false imprisonment the appellants sought to justify the arrest and detention from August 31 to September 1 on the common law ground:

Held (affirming the judgment of the Court of Appeal), that (apart from special circumstances, which did not exist in this case), an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested, and the plea of justification therefore failed.

It is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested: and, therefore, just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion state at the time (unless the party is already acquainted with it), on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. Even if circumstances exist which may excuse this, it is still his duty to give the information at the first reasonable opportunity after the arrest. The exigency of the situation which justifies or demands arrest without a warrant cannot justify or demand either a refusal to state the reason of arrest or a mis-statement of the reason.

On September 15 the respondent was again brought before the court on the charge of "unlawful possession," which with the magistrate's consent was then withdrawn on the ground that the Leicester police had decided to prosecute the respondent for larceny. The respondent was accordingly discharged, but instead of coming from the dock into the body of the court, he was directed by one of the appellants to descend the steps into the cells and was detained until the arrival some hours later of a Leicester policeman who charged him with larceny and took him into custody:

Held (reversing the judgment of the Court of Appeal), that this imprisonment was justified, since the respondent then knew for what alleged felony he was being detained. It is undesirable that an arrest should be made in court, but such an arrest, although it might amount to contempt of court, will not, if otherwise justified, give rise to an action for damages, unless perhaps the person arrested is one who has a duty to be in court, such as counsel, solicitor or witness.

Decision of the Court of Appeal (sub nom. *Leachinsky v. Christie*) [1946] K. B. 124, varied.

APPEAL from the Court of Appeal (Scott and Lawrence L.J.J. and Uthwatt J.).

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The facts, summarized from their Lordships' opinions, were as follows: The respondent, Maurice Leachinsky, was a "waste" merchant, who dealt in what are commonly called "rags," with a warehouse at 196, Beaufort Street, Liverpool. The two appellants, Lewis Christie and Thomas Morris, were respectively a detective constable and a detective sergeant in the Liverpool City police force. The respondent brought an action against the appellants (together with other police officers, who were subsequently dismissed from the suit as a result of the decision of the Court of Appeal), for damages for false imprisonment, alleging that he was wrongfully arrested and detained by them on August 31, 1942. The trial judge, Stable J., directed judgment to be entered for the defendants (including the present appellants) but the Court of Appeal reversed this decision and ordered judgment to be entered for the plaintiff (the present respondent) against the defendants, Christie and Morris (the appellants) for damages, such damages to be assessed by a judge and jury. The appellants appealed to the House of Lords.

The respondent was in the habit of buying his supplies from various towns and had recently from time to time made purchases from a tailoring firm in Leicester, called Michaelsons, acting by Michael Michaelson, a partner. On August 26, he there bought three bales of waste cuttings for 4*l.* 6*s.* 0*d.*, such waste being habitually sold by weight. On August 27, he called with a van to pay for and collect what he had bought and, according to his story, incidentally asked Michaelson if he had any remnants out of which to make a dress for his wife. Michaelson said he had many and in the result the respondent bought the lot for 22*l.* and they were packed into a single bale. The contents were pieces of cloth, stockinet and linings. (The bale was referred to in the evidence as "a bale of cloth.") The respondent paid cash for the whole purchase. He consigned the four bales, together with twenty-three other bales of waste bought from other sellers in Leicester, by carrier to his warehouse in Liverpool, describing the whole consignment for the purpose of the carrier's charges as "waste." (Stable J. considered that no sinister inference should be drawn from this misdescription.) On Saturday, August 29, the Liverpool police, apparently having already some suspicion, on grounds which were not alleged in the pleading or explained at the trial, examined the goods while in the hands of the carrier and so ascertained that one of the bales contained pieces of cloth and not mere "waste." (The investigations of the police may

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have been inspired by the war-time restrictions on the sale and purchase of cloth.) On the morning of Monday, August 31, the appellants secretly watched the unloading of the bales and their removal into the respondent's warehouse by the back entrance. The respondent was present and assisted in the work. He himself carried the bale of cloth inside and placed it near the door; the other bales, which required to be weighed in order to check the purchases, were placed in another part of the premises. The appellants now went round to the front door of the warehouse, entered it without any search warrant and told the respondent they were making inquiries about a bale of cloth which had been delivered to him. The respondent professed to know nothing about any cloth and the appellants set to work to search the premises. The respondent asked whether a search warrant was not necessary but the appellant Morris incorrectly told him that he was not exceeding his powers at all. The appellants, not being satisfied with the explanations given by the respondent (who did not produce any receipt or invoice and did not disclose that he had bought the cloth from Michaelson) arrested him on a charge of "unlawful possession" under the Liverpool Corporation Act, 1921, although they knew his name and his place of residence in Southport, where he had lived for eighteen years. Having cautioned him, they took him in custody to the Essex Street Bridewell, where he was again cautioned. He was brought to Essex Street police station about noon in custody and was later charged by the appellant Christie before Police Sergeant Tindell, who was on duty, with "unlawful possession" under the Act. In the charge book the charge was entered as: "Unlawful possession of a quantity of cloth at the warehouse, 196, Beaufort Street on 31.8.42." The respondent was again cautioned. The appellant Christie told Tindall that bail was not advisable. The respondent was kept a prisoner all night and had an uncomfortable experience when being removed about midnight from one place of detention to another in a police van containing two drunken negroes. The next morning he was brought before the stipendiary on the charge of "unlawful possession" and the prosecuting constable asked for his remand for a week in custody. There was no evidence that the stipendiary was told that when the police arrested the respondent they already knew his name and address; at any rate, he acquiesced in the police request. About 1.30 p.m. on the day of his arrest, the respondent, after being cautioned

by the appellant Christie, made a signed statement in which he gave a full account of how he acquired the property and gave the name and address of Michaelson, from whom he had bought the four bales and to whom he had paid cash for them. The Liverpool police, however, took no steps to bring Michaelson before the Liverpool magistrate and on September 8 the respondent was brought up again and remanded on bail for a further week until September 15. In the meantime, the Leicester police interviewed Michaelson who, for some reason, told a pack of lies, asserting he had never sold the contents of the bale of cloth to the respondent at all and that the articles in that bale had been taken from him without his authority. On September 15, as the Leicester police were intending to prosecute the respondent for larceny and were on their way to arrest him, the Liverpool police applied to the stipendiary for leave to withdraw the proceedings before him. The stipendiary assented to the withdrawal of the only charge before him and, accordingly, discharged the respondent. Instead of coming out of the dock into the body of the court, the respondent was, by the appellant Christie's intervention, motioned to descend the steps to the cells below. The appellant Christie, according to his evidence, which was not contradicted, saw him immediately he left the court and told him that he was being detained on a charge of larceny. He was detained at the Bridewell until the arrival, some hours later of Detective-Sergeant Moorhouse of the Leicester police, who charged him with stealing cloth from Michaelson and took him into his custody. When the respondent was subsequently brought before the court at Leicester his solicitor triumphantly exploded the case against him and showed up Michaelson as a liar. In the result, therefore, the respondent was not proved guilty of any offence.

In the present action the defendants (the appellants) originally pleaded that they arrested the plaintiff (the respondent) "in pursuance of the powers vested in them by ss. 507 and 513 of the Liverpool Corporation Act, 1921, having . . . reasonable and probable cause for believing and/or suspecting that the plaintiff had in his possession a bale of cloth which he had stolen or otherwise unlawfully acquired." At the trial, after the case for the defence had been opened, Stable J. holding that this pleading set up the common law justification for the arrest as well as the statutory justification, gave the defendants leave to amend the passage to read that they arrested the plaintiff "having . . . reasonable and probable cause for

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"suspecting and in fact suspecting that the plaintiff had stolen
"or feloniously received the said cloth." (They thereby
abandoned the statutory justification.) Neither the pleadings
nor the evidence suggested that the respondent was told that
he was arrested on this ground. In the course of the trial of
the action, the appellant Christie was cross-examined as to the
arrest to the following effect: "Q. You made your arrest in
"terms that he was arrested for being in unlawful possession
"of the cloth? A. Yes. Q. You have always, so far as you
"were concerned, dealt with him in terms of being in unlawful
"possession of the cloth It had never been, so far as
"you are concerned, any other charge? A. No.
"Q. Having got the message from Michaelson you
"decided he had stolen the cloth. Why did you not then
"charge him with larceny? A. Because that larceny was
"committed at Leicester and it would then be a matter of
"withdrawing our charge and handing him over to Leicester.
"Unlawful possession was the most convenient charge at the
"time until he could be handed over to the Leicester City
"police Q. Did you know you had no power of arrest
"if you knew the name and address of the man or could reason-
"ably discover it? A. Yes. Q. Knowing that you had no
"power of arrest under that Act, how did you dare to detain
"him on a charge of unlawful possession, when you had all those
"details? A. I was acting on reasonable suspicion and did in
"fact suspect the property had been stolen or feloniously
"received. Q. Did you tell him you were detaining him on a
"charge of feloniously stealing property? A. No." Stable J.
found that the appellants reasonably suspected larceny or
felonious receiving and dismissed the action. The Court of
Appeal reversed this decision and ordered judgment to be
entered for the respondent against the appellants for damages
to be assessed by a jury. The court held unanimously that
the arrest on August 31 was wrongful and further (per
Scott L.J. and Uthwatt J., Lawrence L.J. dissenting) that
the arrest on September 15 was wrongful.

Hemmerde K.C., Nelson K.C. and Patrick O'Connor for the
appellants. The appellants rely on the following propositions:
(a) where a police constable has reasonable and probable cause
to suspect and does suspect that a person has committed a
felony he may lawfully arrest that person without specifying
any particular felony or even telling that person that he is

arresting him on suspicion of felony. (b) Any words used by a police constable at the time of such arrest cannot per se affect the legality of the arrest. (c) A charge subsequently preferred against a person arrested on suspicion of felony does not and cannot affect the legality of the arrest. The cause of action in the present case is trespass to the person; the essential point is putting the man under your control and taking away his freedom so that he acts under your domination; that is an infringement of the liberty of the subject and is prima facie wrong. A police officer arrests at his peril but he is protected if he can show that at the time he had good grounds for suspecting and did suspect that the arrested person had committed a felony. There is no limitation on that protection. The police officer is not bound to specify the felony of which he suspects the man or to formulate the precise legal charge. It is not the law that he is estopped from subsequently relying on his reasonable suspicions if at the time of the arrest he used certain words which did not properly express the correct charge. When there are reasonable grounds for believing that a man has committed a felony, a police officer may arrest him, although in doing so he may allege some other ground. The present case is distinguishable on the facts from *Dumbell v. Roberts* (1) which has nothing to do with it, but if that decision is an authority for the proposition that a police constable who makes up his mind to arrest on suspicion of felony must tell the person arrested at the time of the arrest what is the felony of which he suspects him, it is wrong. It is not even necessary to caution a prisoner unless it is intended to question him: see the Judges' Rules, Archbold's Criminal Practice (31st ed.), pp. 371-2. Further, reasonable suspicion will justify a constable in breaking open doors: see Halsbury's Laws of England (2nd ed.), vol. IX., p. 98, and *Smith v. Shirley* (2). A police officer cannot be expected to make up his mind at once as to which particular offence has been committed and this action is an attempt to put on to him something which it is not his business to decide. The police must be given a certain amount of latitude, for the duty of arresting criminals is important, although less important than the liberty of the subject. This exceptional latitude is necessary because the police officer is faced with the duty of making decisions of his own although he is not a lawyer. It cannot be that unless he adheres to the charge first formulated right up to the end of the proceedings the arrest is necessarily rendered unlawful. In the present case the

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(1) (1944) 113 L. J. (K. B.) 185. (2) (1846) 3 C. B. 142.

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respondent was arrested on suspicion of having committed a felony. Had he asked the police officer whether that was so the answer would have been that it was. There is evidence of a bona fide suspicion of felony in the minds of the appellants when they made the arrest. They believed that the cloth had been stolen and that the respondent had stolen it. They had reasonable grounds for the suspicion which they in fact harboured. There is no case which decides the exact point in the present case, viz., that of an officer purporting to arrest on one charge a man who is actually prosecuted on another. [They referred to *Diamond v. Minter* (1); *Walters v. W. H. Smith & Sons, Ltd.* (2); *Hirsch v. Somervell* (3); *Winslow v. Knight* (4); *Samuel v. Payne* (5); Bullen & Leake's *Precedents of Pleadings* (3rd ed.), pp. 353-4 n; Hawkins' *Pleas of the Crown* (1824 ed.), Bk. 2., c. 12, s. 7, p. 117; Bk. 2, c. 12, s. 18, p. 120; Bk. 2, c. 13, ss. 6-7, p. 129 and Hale's *Pleas of the Crown* (1800 ed.), vol. II., c. 11, pp. 84, 91-2.]

Laski K.C. and *Rose Heilbron* for the respondent. The respondent was arrested on a charge of unlawful possession under s. 507 of the Liverpool Corporation Act, 1921, and that arrest was unlawful. That was the only charge and he was never detained on a reasonable suspicion that he had committed a felony. The appellants did not entertain such a suspicion, and if they had it would not have availed them, for no felony had in fact been committed by anyone. The arrest under the Act was unlawful and a trespass to the person and the onus was on the appellants to justify it by proving that they had reasonable grounds for the suspicion which they allege; they have not discharged it. This case is important as involving the liberty of the subject and the power to arrest without warrant. The issue of a warrant is an act of the judiciary and there is a difference between arrest with and arrest without a warrant but there is an analogy between them. There are also helpful analogies between arrest for felony and arrest on civil process or imprisonment for debt. A fortiori a constable acting executively without a warrant must be subject to at least the same obligations as he would have been subject to if he had acted with a warrant: see *Hooper v. Lane* (6); *Codd v. Cabe* (7); *Horsfield v. Brown* (8); *Ockford v. Freston* (9);

(1) [1941] 1 K. B. 656.

(6) (1856) 6 H. L. C. 443, 456,

(2) [1914] 1 K. B. 595, 601.

550.

(3) (1946) 175 L. T. 456, 461.

(7) (1876) 1 Ex. D. 352.

(4) (1928) 92 J. P. N. 526.

(8) [1932] 1 K. B. 355.

(5) (1780) 1 Doug. 359.

(9) (1861) 6 H. & N. 466, 471.

and the *Six Carpenters* case (1). The appellants were bound to tell the respondent in respect of what felony they were arresting him. It was useless to caution him unless he was told what the charge really was, since he would not give the relevant answers and might be led into a trap : see the Judges' Rules, Archbold's Criminal Practice (31st ed.), p. 372. Further, a police officer acting on his own initiative, has despite the ruling in *Beckwith v. Philby* (2), no superior right to a private citizen in the matter of arrest. [They also referred to the Constables Protection Act, 1750 ; the Indictable Offences Act, 1848, ss. 8, 9 and 10 ; the Summary Jurisdiction Act, 1879, s. 38 ; the Criminal Jurisdiction Act, 1925, ss. 32 and 44 ; the County Courts Act, 1934, s. 147 ; and Halsbury's Laws of England (2nd ed.), vol. IX., p. 97, para. 123 and vol. XXV., p. 235, para. 535.] As to the detention on September 15 after the proceedings under the Act were withdrawn, when he was taken to the cells to await the Leicester police, that was also wrongful : see *Bird v. Jones* (3). It amounted to arrest in the face of the court : Comyn's Digest, Tit. Imprisonment H. 5.

Nelson K.C. in reply. The only authorities cited for the respondent are cases from which it is sought to draw analogies. There is no analogy between arrest for debt and arrest for felony or between arrest on warrant or arrest without a warrant. There is no authority which defines the duty of a police officer arresting on suspicion of felony. He has a right to arrest without giving any ground ; in any event, the man must be taken before a justice within twenty-four hours. Here the police did in fact indicate the general nature of the charge, i.e., that it concerned the cloth in his possession. It is the state of the policeman's mind that justifies the arrest in these circumstances and not what he said. In such cases the police rarely have enough evidence to formulate a precise charge, as distinct from founding a reasonable suspicion. Here they convinced the judge that they arrested on a reasonable suspicion of felony.

THE HOUSE took time for consideration.

1947. Mar. 25. VISCOUNT SIMON. My Lords, I agree with Scott L.J. that the main issue raised is of great importance and requires careful examination, for it concerns the liberty of the

(1) (1610) 8 Co. Rep. 146a.

(3) (1846) 7 Q. B. 742, 752.

(2) (1827) 6 B. & C. 635.

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subject and the extent of the powers of the police to arrest without warrant. There can be no doubt that the Liverpool Corporation Act, 1921, did not authorize this arrest at all. The Act does not use the term "unlawful possession," though this is the customary phrase used in connexion with an infringement of the Act. The phrase is, in fact, somewhat misleading. The following provisions are included in part II. of the Act :

" 507 (1.) Any person brought before any court of summary jurisdiction charged with having in his possession anything which there is reasonable ground to believe or suspect has been stolen and (*sic.*) who does not account to the satisfaction of the court for his possession of the same shall be liable to a penalty not exceeding five pounds or in the discretion of the court to imprisonment for any term not exceeding two months with or without hard labour. (2.) If any person so brought before any court shall declare that he received such thing from some other person or that he was employed as a carrier agent or servant to convey the same for some other person such court shall cause such other person and also if necessary every former or pretended purchaser or other person through whose possession the same shall have passed to be brought before a court and examined (5.) For the purposes of this section the expression 'stolen' means stolen or unlawfully acquired or detained. 513. It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant (1.) any person whose name and residence shall be unknown to such constable and cannot then be ascertained by him and who shall commit any offence against (a) the provisions of this part of this Act." Inasmuch as the appellants knew the respondent's name and also knew his place of residence in Southport where he had lived for the last eighteen years and moreover arrested him in his own warehouse in Beaufort Street, the Act manifestly gave the appellants no right to arrest the respondent for "unlawful possession" without a warrant. What is surprising, and is a matter for severe comment, is that the appellant Christie admitted at the trial that he knew at the time that he had no power to arrest without warrant under the Liverpool Act in the circumstances and that the arrest was nevertheless made on this charge because it was the "most convenient" course. It is much to be hoped that the Liverpool police will be instructed not to disregard the limitations laid down by law in this connexion

again. In another aspect the Liverpool Act is a curious one, for the misdemeanor created by it only arises if the individual, when brought before the magistrate, fails at that stage to account for what is in his possession; no offence, therefore, can be committed before he is brought before the magistrate and the power of the police to arrest and detain an individual (whether with or without a magistrate's warrant, according to circumstances) is not a power to charge him with having committed the crime of "unlawful possession" (for up to that time he has not committed any breach of the Act) but rather a power to arrest and detain him if his name and residence are unknown to them for the purpose of bringing him before the court to give his explanation. The suspicion that a thing "has been stolen" is, of course, quite different from the suspicion that the individual was a party to stealing it or has received it knowing that it was stolen.

In the result, the respondent has not been proved guilty of any offence and he has spent a week in prison, after being arrested on a charge of "unlawful possession" in circumstances where an arrest on this charge was contrary to law. Any liability of the police, however, for the arrest of August 31 ended when the stipendiary ordered the remand in custody, for the remand was the action of the magistrate for which the appellants cannot be held responsible as for false imprisonment. If there were nothing to add to the above facts, it would be clear that the appellants, by arresting the respondent without a warrant on August 31 on a charge of unlawful possession, when they knew his name and residence, were acting illegally and were liable to pay damages for false imprisonment: see *Dumbell v. Roberts* (1). Indeed, this was admitted at the trial. But by an amendment of their defence it was pleaded that at the time of the arrest they had reasonable and probable cause for suspecting, and in fact suspected, that the respondent had stolen or feloniously received the bale of cloth. Stable J. found that this was true, but neither the pleading nor the evidence suggested that the respondent was told that he was arrested on this ground. The question to be determined is therefore whether, when a policeman arrests X. without a warrant, on reasonable suspicion that he has committed a given felony, but gives X. no notice that he is arrested on suspicion of such felony, he is acting within the law. There is nothing in the judgment of the trial judge to indicate that this vital

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question was ever argued out before him at all. Stable J. had no difficulty in holding that in the circumstances arrest on the charge of "unlawful possession," standing by itself, was an unlawful imprisonment, but the fact that the police reasonably suspected larceny or felonious receiving appeared to him to provide a complete defence, though they did not arrest for this charge. The learned judge said: "Of course, if when the police had arrested Mr. Leachinsky, all they had believed was that Mr. Leachinsky was in unlawful possession under the Act of this bale—if that was their state of mind at the time of the arrest they could not justify the detention—a wrongful arrest—thereafter by setting up the fact, if fact it had been, that Mr. Leachinsky had committed some other felony of which they were wholly unaware at the time of making the arrest. The law, it seems to me, on that point is quite plain. But if they believed he had committed a felony when they arrested him, if there were reasonable grounds for that belief, and they arrested him because they so believed, that act, which was legal and justifiable at that time, does not become illegal thereafter because for convenience a charge of unlawful possession is brought in Liverpool, in order that the real charge of larceny may be prosecuted by the police before the court in Leicester, which was really concerned in the matter. The test as I understand it is what was the state of mind of the police at the time of the arrest. Why did they arrest him? If they arrested him because they believed he had committed a felony and there were reasonable grounds for so believing, they do not lose the protection of the law. And what was not a wrongful act at the time does not become an actionable wrong because thereafter the proceedings in Liverpool are confined to what was really a mere formality, unlawful possession, and the prosecution for felony is relegated to the appropriate court."

The all-important question in this appeal is whether this passage correctly embodies the law. If a policeman arrests without warrant when he entertains a reasonable suspicion of felony, is he under a duty to inform the suspect of the nature of the charge, and if he does not do so, is the detention a false imprisonment? In the Court of Appeal Scott L.J. strongly insisted that it was a false imprisonment. Arrest, he pointed out (1), was the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially

(1) [1946] K. B. 124, 130.

investigated. If the arrest was authorized by magisterial warrant, or if proceedings were instituted by the issue of a summons, it is clear law that the warrant or summons must specify the offence. This rule is now embodied in s. 32 of the Criminal Justice Act, 1925, but it is a principle involved in our ancient jurisprudence. Moreover, the warrant must be founded on information in writing and on oath and, except where a particular statute provides otherwise, the information and the warrant must particularize the offence charged. The famous case of *Entick v. Carrington* (1), dealing with the illegality of "general warrants" is an illustration of the principle. Again, when an arrest is made on warrant, the warrant in normal cases has to be read to the person arrested. All this is for the obvious purpose of securing that a citizen who is *prima facie* entitled to personal freedom should know why for the time being his personal freedom is interfered with. Scott L.J. (2) argued that if the law circumscribed the issue of warrants for arrest in this way it could hardly be that a policeman acting without a warrant was entitled to make an arrest without stating the charge on which the arrest was made, and he contrasted (3) what he took to be the general law on this subject with the exceptional situation created by the well-known reg. 18B of the Defence (General) Regulations, made under the Emergency Powers (Defence) Act, 1939, according to which during the emergency the Home Secretary could, if satisfied that it was necessary to do so, make an order with respect to a particular person "directing that he be detained" which detention "shall . . . be deemed to be in legal custody." With Scott L.J.'s judgment his colleague Uthwatt J. agreed: "A person," he said (4), "cannot be lawfully arrested for a misdemeanor by a constable merely because the constable reasonably suspects him of having committed a felony," and he quoted the passage in Hawkins' Pleas of the Crown ((8th ed.), vol. II, c. 10, s. 18), that if a private person is pleading a justification for arresting a man on suspicion, "it seems certain, that regularly he ought expressly to show, that the very same crime for which he made the arrest, was actually committed." The relevance of this quotation becomes clear on examining the decision of *Walters v. W. H. Smith & Son, Ltd.* (5). Lawrence L.J. agreed in the conclusion

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(1) (1765) 19 St. Tr. 1029.

(2) [1946] K. B. 124, 130.

(3) Ibid. 127.

(4) Ibid. 149.

(5) [1914] 1 K. B. 595.

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reached by the Court of Appeal, though he based his view on the previous decision of the Court of Appeal in *Dumbell's* case (1). The learned lord justice, however, indicated his doubts whether this decision was not open to challenge, basing himself, as I understand, largely on the assumption that a constable, when making an arrest without warrant on reasonable suspicion of felony, may do so "without giving any reason to "the person arrested" in as much as "the constable is not "bound to say anything at all." With all respect to the lord justice, I am unable to agree with the propositions quoted and take the view that *Dumbell's* case (1) was rightly decided.

When the appeal came before your Lordships' House the arguments which had prevailed before the Court of Appeal were repeated, but it was not apparently realized by counsel on either side that there is direct authority, both in text books of acknowledged weight and in cases actually decided, that in normal circumstances, an arrest without warrant either by a policeman or by a private person can be justified only if it is an arrest on a charge made known to the person arrested. I owe most of what follows to the erudition of my noble and learned friend, Lord du Parc, who made a careful investigation of the recorded law after the arguments were concluded. Take first the text books. Burn's *Justice of the Peace* is a work of acknowledged authority which has gone through more than thirty editions. It originally appeared in 1755, and the learned author, the Reverend Richard Burn, D.C.L. (who also brought out three successive editions of Blackstone's Commentaries), deals in detail with the law of arrest without warrant. He says (vol I., p. 302) that "where a constable acts without warrant "by virtue of his office of constable, he should, unless the party "be previously acquainted with it, notify that he is constable, "or that he arrests in the Queen's name, *and for what.*" Hale's *Pleas of the Crown* (vol. II, c. 10, p. 82), dealing with arrest by a private person on suspicion, says, "note that in all arrests "he must acquaint the party with the cause of his arrest." Archibald's *Metropolitan Police Guide* (7th ed.), p. 713, is a more modern book which affirms that the general rule is that, in arresting without warrant on suspicion, the person making the arrest, whether constable or private person, should at the time state on what charge the arrest is being made. The propositions laid down in the text books are supported by judicial decisions, to some of which I will briefly refer. What is

(1) 113 L. J. (K. B.) 185.

particularly noteworthy is that in many of these decisions an exception to the general rule is explained and justified, and this indirectly establishes what the general rule is. For example, in *Mackalley's* case (1), the decision of the Star Chamber in the *Countess of Rutland's* case (2), was followed to the effect that it is not necessary to state the ground of arrest when the party makes resistance before the person arresting him "can speak all his words." *Mackalley's* case (1) arose out of an arrest based on a plaint of debt which led to the debtor and his friends resisting the official arrester with fatal results, and it was ruled that "an officer making an arrest, ought to show at whose suit, out of what court, and for what cause he made the arrest, when the party arrested submits himself to the arrest, but not when the party resists." In *Rex v. Howarth* (3), it is laid down that there is no need to tell a man why he is being arrested when he must, in the circumstances of the arrest, know the reason already. Another qualification may be gathered from the decision of *Rex v. Ford* (4), to the effect that it is not necessary for a person making an arrest to state the charge in technical or precise language.

The above citations, and others which are referred to by my noble and learned friend, Lord du Parc, seem to me to establish the following propositions. (1.) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2.) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3.) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4.) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the

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(1) (1611) 9 Co. Rep. 65b.

(3) (1828) 1 Mood. 207.

(2) (1605) 6 Co. Rep. 52b.

(4) (1817) Russ. & Ry. 329.

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reason why it is claimed that this restraint should be imposed (5.) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter. These principles equally apply to a private person who arrests on suspicion. If a policeman who entertained a reasonable suspicion that X. has committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of personal liberty would be gravely infringed. No one, I think, would approve a situation in which when the person arrested asked for the reason, the policeman replied "that has nothing to do with you: come along with me." Such a situation may be tolerated under other systems of law, as for instance in the time of lettres de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an over-riding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty. If I may introduce a reference to the well-known book Dalton's Country Justice, that author, dealing with arrest and imprisonment, says at p. 406: "The liberty of a man is a thing specially favoured by "the common law." And there are practical considerations, as well as theory, to support the view I take. If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further inquiries may save him from the consequences of false accusation. It must be remembered that in former days arrest was practised not only in certain cases of suspected crime, but as a preliminary in civil suits also. I entertain no doubt that in the present case the appellants are not exonerated from liability for false imprisonment by satisfying the judge that they had a reasonable suspicion that the respondent had been guilty of theft or of receiving stolen goods knowing they had been stolen, when they never told the respondent that this was

the ground of his arrest. Instead of doing so, they gave a different ground which, as Christie admitted, was not a good excuse for arresting him at all.

The respondent alleged a second false imprisonment on September 15, 1942, for which the appellant, Christie, was responsible, and the Court of Appeal has held that the claim for damages in respect of this second imprisonment succeeds. The circumstances were that when on that date the respondent, who was on remand, appeared before the stipendiary magistrate, the Liverpool police asked leave to withdraw the charge of "unlawful possession" on the ground that the Leicester police (misled by Michaelson) had decided to prosecute the respondent for larceny and were on their way to arrest him. The magistrate assented to the withdrawal of the only charge that was before him and accordingly discharged the respondent. Instead of coming out from the dock into the body of the court, the respondent was, by Christie's intervention, motioned to descend the steps to the cells below and was detained at the Bridewell until the arrival, some hours later, of a Leicester policeman, who charged the respondent with stealing cloth from Michaelson and took him into his custody. The difference between the facts of the first detention on August 31 and the second detention on September 15 is that on the second occasion the respondent knew what was the alleged felony in respect of which he was being detained. Christie's action on this second occasion was a detention which in substance, if not in form, amounted to an arrest on suspicion of a felony which the respondent knew to be that of larceny, and the case seems to be covered by the exception contained in the third proposition above. Comyn's Digest, Tit. Imprisonment H. 5, indicates that an arrest should not take place "in the face of the court," but, on examining the authorities cited, it seems to me that what is meant is that the proceedings of a court and the part taken by litigants and witnesses are not to be disturbed by the execution of an arrest. The gallery at the Old Bailey is not, I presume, an Alsatia for wanted criminals, but it is certainly a better practice to carry through such detentions as the law authorizes outside. This, in substance, is what Christie did and I do not agree with the Court of Appeal that damages should be awarded for what happened to the respondent on September 15.

I move that, as regards the first imprisonment the appeal

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LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion just delivered by my noble and learned friend on the woolsack, and also the opinions about to be delivered by my noble and learned friends, Lord Simonds and Lord du Parcq, and I desire to express my concurrence in them. I would further like to express my indebtedness to my noble and learned friend, Lord du Parcq, for having drawn our attention to a series of authorities, which are more directly in point than any of the other authorities cited in this House, but which, for some reason, have escaped the notice of counsel, and were not present to the minds of the courts below.

LORD SIMONDS. My Lords, I agree with Scott L.J. in thinking that this case raises questions of importance affecting the liberty of the subject and for that reason think it right to state in my own words why I am of opinion that this appeal should be dismissed. The admirably clear and accurate statement of the facts by the learned trial judge relieves me of the necessity of any prolonged examination of them. I proceed upon the basis that, when the appellants arrested the respondent at his premises in Liverpool at about noon on August 31, 1942, they in fact suspected that he had stolen a bale of cloth or had received it knowing that it was stolen, and further, that they had reasonable grounds for that suspicion. I accept the view adopted by the learned judge and also by Lawrence L.J. in the Court of Appeal that it is not inconsistent with a reasonable suspicion of felony that the possibility of what is colloquially called a "black market" offence should also have been in their minds. I agree further with the learned judge in the view which he took of the plea of justification in the defence and the course that he consequently followed of allowing an amendment. It appears to me that the plea as originally drawn clearly indicated that the defendants relied on the power of arrest at common law as well as on the provisions of the Liverpool Corporation Act, 1921, and that the plaintiff suffered no prejudice whatever by an amendment at the trial which put that plea in proper form. If, then, the appellants reasonably suspected that the respondent had committed a felony, was it not their right to arrest him without a warrant? And, if they did so arrest him, how is it that the arrest can be branded as

illegal and an action for false imprisonment lie against them?

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My Lords, it is here that the crux of the matter lies and it is not easy so to state the law as not on the one hand to impinge upon the liberty of the subject or on the other hand to make more difficult the duty of every subject of the King to preserve the King's peace. It was, I think, this difficulty that led Lawrence L.J. to the conclusion that the appellants were not precluded from pleading their reasonable suspicion of felony, which would have justified arrest, by the fact that they at no time charged the respondent with anything but a misdemeanor, which in the circumstances did not justify arrest. The learned lord justice states his view of the law thus (1) : " It is argued that it is unfair not to let the person arrested " know what the charge against him is, and no doubt it is desirable that he should be informed as soon as possible of the facts " which are said to constitute a crime on his part, and ultimately " when the indictment is framed, what the actual charge is. " But the undoubted fact that the charge may be altered seems " to me to show that the right to know the charge only comes " into existence when the indictment is finally drawn." My Lords, in my opinion, this statement of the law, which the learned lord justice proceeds to apply with perfect logic to the present case, cannot be accepted without qualification. Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? It is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen. Is citizen A. bound to submit unresistingly to arrest by citizen B. in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. (Blind, unquestioning obedience is the law of tyrants and of slaves : it does not yet flourish on English soil.) I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified

(1) [1946] K. B. 124, 147.

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This approach to the question has, I think, a double support.

In the first place, the law requires that, where arrest proceeds upon a warrant, the warrant should state the charge upon which the arrest is made. I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot as it appears to me, justify or demand either a refusal to state the reason of arrest or a mis-statement of the reason. Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it. In the second place, I find assistance in the analogous procedure in civil proceedings in olden days and in imprisonment for debt. Upon the former the judgment of Scott L.J. in this case is illuminating (1). The sheriff, who by judicial writ was directed to bring the defendant before the court, was not left, nor did he leave the defendant, in ignorance of the demand that must be met. Common justice and common sense required that the defendant should know why he should on such and such a day be brought before the King's justices at Westminster or wherever it might be. So also in regard to imprisonment for debt. Upon this subject much information is to be found in *Hooper v. Lane* (2). I think it necessary only to cite a single passage from the speech of Lord Cranworth (3). "The sheriff," he said, "is bound, when he executes the writ, to make known the ground of the arrest, in order, among other reasons, that the person arrested may know whether he is or is not bound to submit to the arrest." Here is a clear illustration of the principle upon which I base this opinion that if a man is to be deprived of his freedom he is entitled to know the reason why.

If, then, this is, as I think it is, the fundamental rule, what qualification if any must be imposed upon it? The cogent instances given by Lawrence L.J. (4) are conclusive that an arrest does not become wrongful merely because the constable arrests a man for one felony, say murder, and he is subsequently charged with another felony, say manslaughter. It is not enough to say that in such a case the accused man could

(1) [1946] K. B. 124, 132.

(2) 6 H. L. C. 443.

(3) Ibid. 550.

(4) [1946] K. B. 124, 146.

not recover any damages in an action for false imprisonment. It is more than that. It is clear that the constable has not been guilty of an illegal arrest, if he reasonably suspected that murder had been done. Again, I think it is clear that there is no need for the constable to explain the reason of arrest, if the arrested man is caught red-handed and the crime is patent to high Heaven. Nor, obviously, is explanation a necessary prelude to arrest where it is important to secure a possibly violent criminal. Nor again, can it be wrongful to arrest and detain a man upon a charge, of which he is reasonably suspected, with a view to further investigation of a second charge upon which information is incomplete. In all such matters a wide measure of discretion must be left to those whose duty it is to preserve the peace and bring criminals to justice. These and similar considerations lead me to the view that it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment. But this, and this only, is the qualification which I would impose upon the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. The "charge" ultimately made will depend upon the view taken by the law of his act. In ninety-nine cases out of a hundred the same words may be used to define the charge or describe the act, nor is any technical precision necessary: for instance, if the act constituting the crime is the killing of another man, it will be immaterial that the arrest is for murder and at a later hour the charge of manslaughter is substituted. The arrested man is left in no doubt that the arrest is for that killing. This is I think, the fundamental principle, viz., that a man is entitled to know what, in the apt words of Lawrence L.J., are "the facts which are said to constitute a crime on his part" (1). If so, it is manifestly wrong that a constable arresting him for one crime should profess to arrest him for another. Of what avail is the prescribed caution if it is directed to an imaginary crime? And how can the accused take steps to explain away a charge of which he has no inkling?

I turn, then, to the present case which appears to me to present a strange combination of circumstances. For, while I doubt not, that the appellants reasonably suspected the respondent of having committed a felony, yet I must, on the

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evidence, conclude that they refrained from bringing home to his mind at the time of arrest that that was their suspicion. Their minds, it is clear, were running on the provisions of the Liverpool Act, that curiosity of penal legislation, about which I need say no more than has already fallen from your Lordships. It is from that Act alone (though the *ipsissima verba* do not occur in it) that the expression "unlawful possession" with which this case is riddled, is derived. So when counsel asked the appellant Christie in cross-examination "You made your arrest in the terms that he was arrested for being in unlawful possession of the cloth?" though he may well have wondered what was meant by "in the terms that," he answered "Yes." And to the next question "You have always, so far as you were concerned, dealt with him in terms of being in unlawful possession of the cloth . . . ? It has never been, so far as you are concerned, any other charge?" he answered "No." So also in the station charge book the charge was entered "unlawful possession of a quantity of cloth at the warehouse, 196, Beaufort Street on 31.8.42." And so the matter proceeded. It is clear, then, that whatever may have been the secret thought of the constables at the time of the arrest and detention, they allowed him to think that he was being arrested for being "in unlawful possession" of certain goods, an offence, if it be an offence, which was at the most a misdemeanor within the Liverpool Act and could not, except under conditions which did not here obtain, justify an arrest without a warrant, and was described in terms not calculated to bring home to him that he was suspected of stealing or receiving the goods. In these circumstances the initial arrest and detention were wrongful. He was not aware and was not made aware of the act alleged to constitute his crime but was misled by a statement which was calculated to suggest to his uneasy conscience that he was guilty of a so-called black market offence. It is no answer that the constables had no sinister motive. They had, from the administrative point of view, a perfectly good motive. It will be found in an answer to a question, which, though it related to a later stage of the proceedings, is equally applicable to the earlier, "Why did you not then charge him with larceny?" To this the revealing answer was "Because that larceny was committed at Leicester and it would then be a matter of withdrawing our charge and handing him over to Leicester. Unlawful possession was the most convenient charge at the time until he could be

"handed over to the Leicester city police." My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law.

Upon the second part of the case, viz., the alleged wrongful imprisonment on September 15, I will add only a few words. Here I find myself in complete agreement with the conclusions reached by the learned trial judge and Lawrence L.J. On that day Christie suspected the respondent of a felony with which the Leicester police proposed to charge him. He had good grounds for his suspicion. For it was the misfortune of the respondent that the doubts engendered by his own equivocation had been strengthened by the false statements of Michaelson, his associate in the transaction, so that his belated candour did not carry the conviction that it otherwise might have done. I see no reason, therefore, why Christie, entertaining the reasonable suspicion, which he had no reason to doubt that the Leicester police shared, should not have arrested the respondent and detained him to await their arrival. Here, as it appears to me, there was no question of convenience superseding the law. On the contrary Christie was acting within the law and in accordance with his duty. It is not necessary to decide the question whether it was unlawful to effect the arrest actually in court. I should hesitate to say that such an arrest is necessarily unlawful. But, in any case, the difference between being arrested on one side of the door of the court or the other is unsubstantial and I agree that the rule of "de minimis" is applicable. Therefore, whilst concurring in the motion that the appeal should be dismissed, I would add, that in the assessment of damage only the first arrest and consequent imprisonment should be considered.

My Lords, since writing this opinion, I have had the advantage of seeing in print the speeches of my noble and learned friends Lord Simon and Lord du Parc. I am fully in agreement with them and am happy to find that the authorities, which are now brought to the attention of the House, amply support the conclusions at which I had arrived.

LORD DU PARC. My Lords, it is common ground between the parties to this appeal, and was admitted by the appellant

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Christie in the witness-box, that the only charge made against the respondent at the time of his arrest, and during the period described in the order of the Court of Appeal as the "first imprisonment," was a charge under s. 507, sub-s. 1, of the Liverpool Corporation Act. It is beyond doubt that the appellants had no right to arrest the respondent without a warrant on that charge. There is, I think, equally no doubt that, at common law, "a constable is justified in arresting a person "without a warrant, upon a reasonable suspicion of a felony "having been committed, and of the person being guilty of it, "although no felony has in fact been committed." In stating this proposition, I have quoted a passage from Bullen & Leake's *Precedents of Pleading* (3rd ed.), p. 795. I should have said that this proposition was both indisputable and undisputed, but for the fact that I understood Mr. Laski to tell the House that he was prepared to challenge it if it were thought desirable that he should deal with the point. Certainly it has come to be regarded as a settled principle of our law. It confers on the police one of the few privileges which they enjoy at common law, and it is relevant to the serious question which your Lordships have to decide to observe how gradually, and one may almost say grudgingly, the courts came to grant to the peace officer a right denied to the private citizen, who cannot justify an arrest on reasonable suspicion of felony if the suspected felony has not in fact been committed. The law at first recognized no distinction in this respect between the private citizen and the peace officer, who was thus put into a position of difficulty. If he were called on by a private citizen of repute to arrest a person for felony, he was in duty bound to do so. The oath administered to a high constable in the seventeenth century contained the words "You shall do your best endeavour (upon complaint to you made) to apprehend all felons, barretors and rioters," and petty constables were called upon to swear that in the presence of the high constable they should "be aiding and assisting unto him," and in his absence they should "execute his office." (The oaths are set out fully in Captain Melville Lee's "History of Police in England" (1901) at p. 111.) Abbott C.J. was, therefore, stating a long-established rule when he said, in 1827, that "if a reasonable charge of felony is given, "a constable is bound to take the party into custody." (*Cowles v. Dunbar* (1).) It might turn out that the constable's informant was mistaken, and that no felony had been committed,

(1) (1827) 2 Car. & P. 565.

and then the officer would be held liable in an action for false imprisonment. A solution was found in 1780, when it was held that a constable could justify arrest made on a charge preferred by another person, although no felony had in fact been committed. (*Samuel v. Payne* (1).) This case did not decide, however, that the constable could safely arrest on suspicions of his own, however reasonable they might be, if no felony had been committed. Indeed, it remained the better opinion for many years that in such a case he was not protected. Buller J., in 1788, stated the law as it was then understood in these words: "that if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or a breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." This ruling of Buller J. in the unreported case *Williams v. Dawson* (2) was in terms approved by Lord Ellenborough C.J. in 1813 (*Hobbs v. Branscomb* (3)). In 1827, however, Lord Tenterden C.J., giving the judgment of the Court of King's Bench in *Beckwith v. Philby* (4) distinguished the case of the constable from that of the private individual, and said that "a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." This would seem to conclude the matter. But the old rule died hard, and even in 1869, in the thirtieth edition of Dr. Burn's *Justice of the Peace* (vol. I, p. 295), a doubt is expressed whether the constable who acts on his own initiative is in any different position from the private citizen, save in some exceptional cases. No such doubt can be justified to-day. The judges of England have long regarded the law on this point as settled—see, for instance, the judgment of Blackburn J. in *Hadley v. Perks* (5), and that of Isaacs C.J. in *Walters v. W. H. Smith & Son, Ltd.* (6), and juries have long been directed as a matter of course in accordance with the rule stated in the passage which I have quoted from Bullen & Leake. Your Lordships, I think, will all agree with Stable J. and the Court of Appeal that the generally accepted view is, without doubt, correct.

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(1) (1780) 1 Doug. 359.

(2) (1788) Unreported.

(3) (1813) 3 Camp. 420, 421.

(4) (1827) 6 B. & C. 635, 638.

(5) (1866) L. R. 1 Q. B. 444, 456.

(6) [1914] 1 K. B. 595, 602.

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The question which gives to this appeal its importance and interest may be stated fairly, I think, as follows: In the circumstances of this case was it open to the appellants, who arrested and imprisoned the respondent without a warrant on a charge, formally made, on which they could not lawfully so arrest him, to justify that arrest and imprisonment by proof that, at and after the time of the arrest, they suspected him, on reasonable grounds, of having committed one or other of certain felonies? In so stating the question I have assumed that the police spoke the truth when they said that they suspected Mr. Leachinsky of felony, and that they had reasonable grounds for their suspicion. Stable J. so found and I am not prepared to differ from this finding of fact. The appellants, in para. 17 of their case, set out the contention which their counsel sought to maintain at the Bar, "that "where a police constable has reasonable and probable cause "to suspect and does suspect that a person has committed "felony he may lawfully arrest that person without specifying "any particular felony or even telling that person that he is "arresting him on suspicion of felony." If this contention were accepted, it would not necessarily follow that a constable acts lawfully if he specifies as the ground of arrest some charge (not itself justifying arrest without warrant) other than that for which he is in fact making the arrest. The contention, however, constitutes a necessary step in the appellants' argument and must be examined. Even if the appellants' proposition be read as referring only to the moment of arrest, it is not an accurate statement of the general rule. My noble and learned friend on the woolsack has cited authorities which, while they show that circumstances may justify an arrest without a statement of the reason for the arrest, do not invalidate, but rather assume and affirm, the general rule which my noble friend has quoted from Burn's Justice of the Peace, to which rule they must be regarded as exceptions. The principles established by the authorities are agreeable to common sense, and follow from the governing rule of the common law that a man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, that person must as a general rule tell him what the reason is, for, unless he is told, he cannot be expected to submit to arrest, or blamed for resistance. The right to arrest and the duty to submit are correlative. This principle is applicable both to arrests in

execution of civil process and to arrests on a criminal charge. It was stated in this House by Lord Cranworth L.C. in *Hooper v. Lane* (1), when he said that a sheriff "is bound, when he "executes the writ, to make known the ground of the arrest, "in order, among other reasons, that the person arrested may "know whether he is or is not bound to submit to the arrest."

While this is the general rule, it is certainly true that officers and ministers of public justice, of whom Sir Matthew Hale says in his *Pleas of the Crown* (vol. II, c. 10), that they are under a greater protection of the law than private persons, are often justified in making an arrest without a preliminary, or simultaneous, statement of the charge. The law does not encourage the subject to resist the authority of one whom he knows to be an officer of the law. In *Mackalley's case* (2), where it was a serjeant-at-mace who made the arrest, it was said that if the party knows the person arresting him to be an officer he must not offer resistance, "and if he has not a lawful warrant he "shall have his action of false imprisonment." That case however, plainly recognized that the officer was under a duty to state the ground of the arrest "when the party arrested "submits himself to the arrest." The present case was not one of those exceptional (I do not say rare) instances in which no charge need be stated at the time of arrest. Mr. Leachinsky was not so ill-advised as to offer resistance to the police, who had no excuse at all to offer for not performing their duty to acquaint him with the ground of the arrest except, it would seem, ignorance of the law. I am glad to think that this ignorance is exceptional, and, in this regard, some of the answers given by Detective-Sergeant Moorhouse, of the Leicester City police, when under cross-examination, are significant and reassuring. It must be admitted that the form of the questions which he was answering is not to be commended, and that objection might well have been taken to them, but his answers are of value as showing what the witness, as an experienced police officer, understood his duty to be. I will quote four questions and answers: "Q. When a man is "arrested, immediately on arrest he is told what he is arrested "for, is he not?—A. By me; I always tell him what he is "arrested for. Q. The law is, even if you be a police officer "of the highest rank, you cannot detain a man without telling "him why he is detained, can you?—A. He should be told "why he is detained. Q. At once?—A. Yes. Q. Meaning

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(1) 6 H. L. C. 443, 550.

(2) 9 Co. Rep. 65b, 66a.

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 Lord du Parcq. “by ‘at once’ the earliest reasonable moment?—A. The
 “earliest reasonable moment.” In my opinion, those answers
 correctly state the policeman’s duty. In cases where a state-
 ment of the charge at the moment of arrest is, in the circum-
 stances, excused there is still a duty to acquaint him with it at
 the first reasonable opportunity. Arrest (as is said in Dalton’s
 Country Justice, 1727 ed., at p. 580) “may be called the
 “beginning of imprisonment,” and these appellants were called
 on to justify the whole imprisonment and not its beginning
 alone. Indeed, I find it difficult to believe that the appellants
 would have sought to defend their conduct if the fact had been
 that Mr. Leachinsky had been arrested and taken to prison
 without ever being given a reason for his arrest until he came
 before the magistrate. It is a curious feature of this case that
 the arrest and the subsequent proceedings were carried out
 with what must have seemed to any man unskilled in the
 law to be a careful attention to all the requisite formalities.
 The appellants did not omit to charge the respondent at the
 time of his arrest. They charged him, in due form, with an
 offence which, as the appellant Christie admittedly knew,
 did not justify the arrest. They cautioned him when he was
 arrested, and I must assume, in the absence of evidence as to
 the words used, that the form prescribed by the Judges’ Rules (1)
 was followed, and that he was asked the question “Do you wish
 “to say anything in answer to the charge?” The caution was
 twice repeated—when the police arrived with the prisoner at
 the police station, and again when he was taken before Sergeant
 Tindall, the “bridewell sergeant.” He was thus, with
 impressive solemnity, invited on three separate occasions to
 defend himself on a charge which was not the charge for which
 he was arrested. This repetition of a deceptive formula does
 not disguise the fact that the appellants wholly failed in their
 duty to tell him what that charge was.

The omission to tell a person who is arrested at, or within a
 reasonable time of, the arrest with what offence he is charged
 cannot be regarded as a mere irregularity. Arrest and imprison-
 ment, without a warrant, on a charge which does not justify
 arrest, are unlawful and, therefore, constitute false imprison-
 ment, whether the person making the arrest is a policeman or a
 private individual. This follows in my opinion from the
 decision of the judges in *Rex v. Curvan* (2). Curvan had been

(1) Archbold’s Criminal Practice (2) (1826) 1 Mood. 132.
 431st ed.), pp. 371–2.

arrested by a constable, without a warrant, for "insulting a man on a road." The constable was acting on a complaint which had been made to him, but the alleged offence did not, of course, justify Curvan's arrest without a warrant. He escaped, and, later, one Walby, a private person, on whom the constable had called for assistance, stopped him and attempted to arrest him, threatening him with a stick. Curvan, after telling Walby that he would stab him if he did not let him go, cut him in the face with a knife. He was subsequently tried on an indictment, one count of which charged him with feloniously cutting Walby "with intent to obstruct, resist, and prevent the lawful apprehension and detainer of the prisoner, for a certain offence, for which he was then liable by law to be apprehended and detained." He was convicted on this count. Holroyd J. who tried the case, reserved it for the opinion of the judges, who held (1) "that the original arrest was illegal, and that the recaption would also have been illegal; and, therefore, the case would not have been murder if death had ensued, and consequently the prisoner was entitled to an acquittal." The importance of this decision for the present purpose is not so much that it strikingly demonstrates to what lengths a man may go in the defence of his liberty as that it emphasizes the illegality of an arrest without a warrant on a specified charge which does not justify such an arrest. If when a charge which does not justify arrest has been expressly made the person charged is entitled to resist apprehension, I find it impossible to suppose that the law will hold the arrest good if it subsequently appears that the officer had in his own mind an unexpressed suspicion that a felony had been committed. The right to resist is, as I have tried to show, always limited by the duty to submit to arrest by an officer of the law even though the reason for arrest is not at once stated. *Rex v. Woolmer* (2) was a case in which a man's failure to observe this distinction led to his conviction and punishment for a violent attack on the watchman who was seeking to apprehend him. But if a reason has been stated which is, on the face of it, insufficient to justify arrest without warrant, no man could safely defend his liberty if some other ground for the arrest, which the officer had deliberately chosen to conceal from him, could subsequently be brought forward by way of justification. The prisoner in *Rex v. Curvan* (3) could not properly have been

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(1) 1 Mood. 133-4.

(2) (1832) 1 Mood. 334.

(3) 1 Mood. 132.

H. L. (E.) convicted even if it had been proved at his trial that the constable had in his mind a reasonable suspicion that he had committed a felony.

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I have already reminded your Lordships of the reluctance of the courts to accord to the officer of the law any rights or privileges which are denied to private citizens. "With some few exceptions," Sir James Fitzjames Stephen wrote in a passage which was cited by Scott L.J. (1) "he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily." (History of the Criminal Law, vol. I, p. 494.) The learned author said further that when the police constable had made an arrest he was under precisely the same obligations as a private person, and I believe this to be a correct statement of the common law. It can hardly be maintained that it would be a mere irregularity, against which the law provides no sanction, if a private person were to arrest and detain a fellow subject without intimating to him the reason for his imprisonment, or that such a person could strengthen his position in the eyes of the law by stating an inadequate reason, and keeping a better one in reserve. I know of no previous case in which the police, to say nothing of private persons, have claimed a right to keep their prisoner in ignorance of the charge which he has to meet. It is worthy of note that when one Bentley was tried and convicted at the Central Criminal Court in 1850 in consequence of violent resistance which, being drunk at the time, he had offered to the constable arresting him, and it was part of his defence that the constable had not told him for what he was being arrested, Talfourd J., who was the judge, in his charge to the jury laid stress on the fact that the constable had told the prisoner "that if he went to the station he should know the charge against him": see *Reg. v. Bentley* (2). Finally, the duty to make a definite charge against a person who has been arrested without a warrant has been impliedly affirmed by the legislature. Section 22 of the Criminal Justice Administration Act, 1914, which replaced s. 38 of the Summary Jurisdiction Act, 1879, provides that "on a person being taken into custody for an offence without a warrant, a superintendent . . . may in any case, and shall, if it will not be practicable to bring such person before a court of summary jurisdiction within twenty-four hours after he was so taken into custody, inquire

(1) [1946] K. B. 124, 131.

(2) (1850) 14 J. P. 671.

“ into the case, and, unless the offence appears to such superintendent to be of a serious nature, discharge the person upon his entering into a recognisance ” The offence to be inquired into is the offence for which the person has been arrested. For these reasons I take the same view of the law as that which has been more concisely expressed by my noble and learned friend on the woolsack, and I agree with him that the arrest of the respondent and his detention down to the time when he was first brought before a magistrate were unlawful, and that he is entitled to recover damages for false imprisonment in respect of them.

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I have not so far dealt with the “ second imprisonment ” referred to in the order of the Court of Appeal. In my opinion the appellant Christie was justified in detaining the respondent from the time of his acquittal on the charge under the Liverpool Corporation Act until the Leicester police took him into custody. This seems to me to be plain, in the light of the admitted facts, on the principle stated in *Beckwith v. Philby* (1), which I have already cited. Christie said in his evidence that he had almost immediately told the respondent the true ground of this detention. The respondent was not asked whether he had been so informed, partly because of the state of the unamended pleadings when he first went into the witness-box, and partly, no doubt, because Stable J. expressed the view that the matter was irrelevant. I think, however, that there is no reason to doubt that Christie’s evidence on this point was true, and I did not understand counsel for the respondent to challenge its accuracy. The only question which remains is whether Mr. Leachinsky ought to have been allowed to leave the court by another exit, and not directed to go immediately into confinement, and it is suggested that what was done was tantamount to an arrest in the face of the court, and was thus unlawful on the authority of Comyn’s Digest Tit. Imprisonment H. 5. If Mr. Leachinsky had gone out by the door of the court he would, and could lawfully, have been at once arrested, so that on any view he could not be said to have suffered serious damage by the alleged irregularity. I am of opinion, however, that, although it is no doubt undesirable, speaking generally, that an arrest should be made in court, such an arrest, while it might well be a contempt of court in certain circumstances, will not, if in other respects justified, give rise to an action for damages, unless indeed the person arrested is one who has a

H. L. (E.) duty to be in court (as, for instance counsel, solicitor, or witness) when different considerations may apply. The authorities cited in Comyn's Digest all deal with arrest in execution of civil process, and, even if it be right to regard this as an immaterial distinction, they do not seem to me to assist the respondent.

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In the result I think that this appeal fails on the main issue, although the order of the Court of Appeal will require modification in respect of the "second imprisonment." I must add, however, that although I agree in the result with the judgment of Scott L.J. on the main issue, I must not be taken to approve all the statements of the law which it contains. Some of these statements will be seen, I think, to be inconsistent with the view of the law which I have stated, but it is right that I should deal particularly with two of them. First, if, as I think, the learned lord justice intended to lay down that the charge must be specifically and precisely formulated, without "duplicity" in the technical sense of that word, at the time of arrest, I think that his view is contrary to authority and much too strict. If it were right, it would put great difficulties in the way not only of the police but of private persons who felt it to be their duty to make an arrest on suspicion. It is, however, manifestly contrary to what was decided by the judges in *Rex v Ford* (1), a case in which the charge was most inaptly stated at the time of arrest. Ford violently resisted arrest, and his defence that he was not charged with any legal offence did not avail him. The judges held (2) that, although the charge was defective, this defect was immaterial, and "that it was not necessary the charge should contain the same accurate description of the offence as an indictment." Secondly, I think that the observations of the learned lord justice as to the impropriety of arresting on a minor charge a man suspected of murder may be understood in a sense which the lord justice cannot, I think, have intended them to bear. If all that the lord justice means is that the police have no right to arrest a man suspected of murder on a minor charge solely in order to prevent his escape, and with no belief in or reasonable suspicion of his guilt on that minor charge, then I think that his opinion is plainly right. If, however, his words are to be taken to mean that it is wrong to arrest such a suspect on a minor charge, itself of such a nature as to justify arrest without a warrant, of which the police believe him to be guilty, when their real or principal motive is to prevent his escape from justice, and that in such a case arrest

(1) Russ. & Ry. 329.

(2) Ibid. 331.

and detention on the minor charge would constitute false imprisonment, I must say, with great respect, that this seems to me to be a highly questionable proposition. I concur in the motion which is about to be proposed from the woolsack.

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VISCOUNT SIMON. My Lords, my noble and learned friend, Lord Macmillan, who is not able to be present to-day, authorizes me to say that he concurs in the opinions which have been expressed in this case.

Appeal dismissed as regarded the first imprisonment and allowed as regarded the second imprisonment.

Solicitors for appellants: *Cree & Son, for W. H. Baines, Liverpool.*

Solicitors for respondent: *Sidney Pearlman, for Silverman & Livermore, Liverpool.*

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS ; H. L. (E.)*

AND

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AUSTRALIAN MUTUAL PROVIDENT
SOCIETY RESPONDENTS.

Jan. 30, 31 ;
Feb. 3, 4 ;
Mar. 31.

Revenue—Income tax—Provident society—Head office in Australia—Branch in United Kingdom—Some investments in life assurance fund exempt from income tax—Assessment of tax liability—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. D., case III., r. 3.

By r. 3 of case III. of sch. D. of the Income Tax Act, 1918 :
 “ (1.) Where an assurance company not having its head office in the
 “ United Kingdom carries on life assurance business through any
 “ branch or agency in the United Kingdom, any income of the
 “ company from the investments of its life assurance fund (excluding
 “ the annuity fund, if any) wherever received, shall, to the extent
 “ provided in this rule, be deemed to be profits comprised in this
 “ schedule and shall be charged under this case. (2.) Such portion
 “ only of the income from the investments of the life assurance
 “ fund for the year preceding the year of assessment shall be so

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD NORMAND.

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"charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency in the United Kingdom bears to the total amount of the premiums received by the company : Provided that in the case of an assurance company having its head office in any British possession the Commissioners of Inland Revenue may, by regulation, substitute some basis other than that herein prescribed for the purpose of ascertaining the portion of the income from investments to be so charged as being income derived from business carried on in the United Kingdom. (3.) Every such charge shall be made by the special commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners. (4.) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced."

A provident society carried on mutual life assurance business having its head office in Australia and a branch in London, and, accordingly, not being resident in the United Kingdom, was entitled under the Income Tax Act, 1918, to exemption from United Kingdom income tax in respect of interest and dividends from securities and investments forming part of its life assurance fund falling within either s. 46 or r. 2 (a) of sch. C. or r. 7 of the Miscellaneous Rules of sch. D. A question arose as to the computation of the assessable income arising from the profits of the London branch for the four years ending April 5, 1937, 1938, 1939 and 1940 respectively.

Held, that r. 3 did not tax income from investments, whether exempted or not, but a conventional sum calculated as the rule directed; accordingly the sum to be taxed was not affected, by the fact that one of the factors in the calculation contained income from exempted investments, and there was no reduction of the society's liability on that ground.

Hughes v. Bank of New Zealand [1938] A. C. 366 and *Sinclair v. Cadbury Brothers, Ltd.* (1933) 103 L. J. (K. B.) 29; 18 Tax Cas. 157 distinguished.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal (Lord Greene M.R., Somervell and Cohen L.JJ.).

The respondent society carried on mutual life assurance business having its head office at Sydney, New South Wales and a branch in London, through which it carried on a portion of its business. The respondent society was not resident in the

United Kingdom for the purposes of United Kingdom income tax and for the years in question (the years ending April 5, 1937, 1938, 1939 and 1940 respectively) was entitled to exemption from that tax in respect of interest and dividends on securities and investments falling within s. 46, r. 2 (d) of sch. C., and r. 7 of the Miscellaneous Rules of sch. D. of the Income Tax Act, 1918. As the respondent society carried on business at its London branch it was assessable to income tax under the provisions of case III, r. 3, sch. D. and its forerunner, s. 15 of the Finance Act, 1915, and a regulation made thereunder by the Inland Revenue Commissioners, the appellants, on April 5, 1917, following an application therefor by the respondent society. The regulation was as follows: "The income from
 " the investments of the life assurance fund (excluding the
 " annuity fund) of the society shall be charged to the following
 " extent, instead of to the extent directed by the first paragraph
 " of sub-s. 2 of s. 15 of the Finance Act, 1915; that is to say,
 " such portion only of the said income shall be charged as bears
 " the same proportion to that income, as the amount of the
 " liability in respect of life assurance policies, in cases where the
 " policy holders are resident in the United Kingdom, and,
 " in cases where the policy holders are resident abroad, but the
 " proposals were made to the society at or through a branch or
 " agency in the United Kingdom, bears to the total amount of
 " the liability in respect of all life assurance policies issued by
 " the society, such liabilities being estimated in the same
 " manner as they are estimated for the purpose of the periodical
 " returns of the society to the Board of Trade under the
 " Assurance Companies Act, 1909." The regulation thus substituted a ratio of United Kingdom liability to total liability for the ratio provided by r. 3 itself, namely, the ratio which premiums received from policy holders resident in the United Kingdom, and from policy holders whose proposals were made to the respondent society at or through its office or agency in the United Kingdom, bore to the total amount of the premiums received by the respondent society. The respondent society at all material times held as part of the investments representing its life assurance fund securities and investments falling within s. 46, r. 2 (d) of sch. C. and r. 7 of the Miscellaneous Rules of sch. D. and was assessed under the regulation in respect of the income of a portion of the fund, no exclusion of or relief from tax on the exempted fund being given effect to. In the year ended December 31, 1935, (year of assessment

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1936/37), this exempted income amounted to 72,354*l.* Consequent on the decision in *Hughes v. Bank of New Zealand* (1) the respondent society made a claim for repayment of part of the income tax charged on it by virtue of the regulation, on the ground of error or mistake having been made in the computation of the amount chargeable for the years in question. In computing the amount of relief to be allowed under this claim the appellants deducted the income arising from the exempted securities and investments from the total income of the life assurance fund (excluding the annuity fund) and applied the appropriate ratio as defined by the regulation to the balance of the income. The respondent society claimed that the appropriate ratio should be applied to any income of the life assurance fund (excluding the annuity fund) as calculated under the practice existing prior to the decision in *Hughes v. Bank of New Zealand* (1) and that the income from the exempted securities and investments should be deducted from the resulting figures. A statement showing the result of the opposing methods was annexed to the case stated. As regarded the year of assessment, 1936/37, the figures were as follows :

	Society's method.	Revenue's method.
WHOLE SOCIETY—		
Income received on assurance fund investments	4,145,067 <i>l.</i>	4,145,067 <i>l.</i>
<i>Deduct—</i>		
Amounts included therein coming under s. 46, r. 2 (d), of sch. C. and r. 7 of Miscellaneous Rules of sch. D. ..		72,354 <i>l.</i>
	4,145,067 <i>l.</i>	4,072,713 <i>l.</i>
Ratio based on proportion of liabilities in respect of life assurance policies in United Kingdom to total liabilities for all policies	.05565268	
LONDON BRANCH—		
Proportion of income on assurance fund investments of whole society based on above ratio	230,684 <i>l.</i>	226,646 <i>l.</i>
<i>Deduct—</i>		
Exemptions as above	72,354 <i>l.</i>	
	158,330 <i>l.</i>	226,646 <i>l.</i>

(1) [1938] A. C. 366.

The Commissioners for the Special Purposes of the Income Tax Acts preferred the Crown's method of computation. Macnaghten J. dismissed an appeal by way of case stated from their decision but the Court of Appeal allowed an appeal by the respondent society. The appellants appealed to the House of Lords.

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Sir Frank Soskice S.-G. and R. Hills for the appellants. The problem in this case is the working out of the formula under r. 3. Three hypothetical examples have been prepared :

EXAMPLE I.

(Where no tax exempt securities held.)

Total world income	500,000 <i>l.</i>	
of which		
British taxed income, consisting, say, of dividends and interest on British stocks and shares is	50,000 <i>l.</i> at 10 <i>s.</i>	Tax actually paid. 25,000 <i>l.</i>
Total world liability on policies ..	4,000,000 <i>l.</i>	
Total U.K. liability on policies ..	1,000,000 <i>l.</i>	
Ratio for r. 3 is therefore	1/4th.	
Income to be taxed under r. 3 is therefore 1/4 of 500,000 <i>l.</i> ..	125,000 <i>l.</i>	
Deduct under r. 3, sub-r. 4, income which has already paid tax ..	50,000 <i>l.</i>	
Further tax to be paid on	75,000 <i>l.</i> at 10 <i>s.</i>	37,500 <i>l.</i>
Total tax payable		62,500 <i>l.</i>

EXAMPLE 2.

(Adopting Revenue's method of computation.)

World income (as in Example 1) ..	500,000 <i>l.</i>	
British income (assuming original shares and debentures sold and proceeds put into exempt securities which produce a similar income) is	50,000 <i>l.</i>	Tax payable Nil.
Assume ratio is 1/4 as before— Income to be taxed under r. 3 (on Revenue's contention is 1/4 of 500,000 <i>l.</i> —50,000 <i>l.</i> , viz. 450,000 <i>l.</i>	112,500 <i>l.</i>	
Less tax already paid by deduction	Nil.	
Tax to be paid on	112,500 <i>l.</i> at 10 <i>s.</i>	56,250 <i>l.</i>
Total tax payable		56,250 <i>l.</i>

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EXAMPLE 3.

(Adopting Society's method of computation.)

1947	World income (including 50,000 <i>l.</i>		
INLAND	exempt income)	500,000 <i>l.</i>	
REVENUE	1/4 of this is	125,000 <i>l.</i>	
COM-	Less exempt income	50,000 <i>l.</i>	
MISSIONERS			
AUSTRALIAN	Taxable income	75,000 <i>l.</i> at 10 <i>s.</i>	37,500 <i>l.</i>
MUTUAL			
PROVIDENT	Tax payable		37,500 <i>l.</i>
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The Court of Appeal decided in favour of Example 3, although according to those figures the respondent society claimed to be entitled to make a deduction of 50,000*l.* from a figure of 125,000*l.* which contained only 25 per cent. of the 50,000*l.* There is nothing in r. 3 to suggest that the tax-free income is to be mixed with the amounts to be brought into charge. The assessments to income tax made on the respondent society in respect of its life assurance fund under r. 3 and the statutory regulation made thereunder have, subject to the relief allowed by the appellants, been correctly computed. The provisions of the Act of 1918, whereby income from certain classes of investments is specifically exempted from income tax, do not require that the amount of the income in respect of which tax is chargeable upon the respondent society under r. 3 should be computed in the manner contended for by the respondent society. Since under r. 3, sub-r. 2, the charge is primarily based on total world investment income, the proper method of giving effect to the specific exemptions in question is to exclude the income from such investments altogether in arriving at the amount of the income of the life assurance fund of the respondent society and then to apply the ratio, as directed by the rule and the regulation, to the residue of the total income of the fund. No income tax will be charged on the exempted income under any other provision of the Income Tax Acts. Thus full effect is given to the exemptions. *Hughes v. Bank of New Zealand* (1) and *Sinclair v. Cadbury Brothers, Ltd.* (2) do not help the respondent society because neither of these decisions enunciated a principle. The Crown's method of computing the income of the life assurance fund taxable under r. 3 and the regulation is in accordance with the reasoning in the former case, while the latter has no application to the present facts or to the construction of r. 3, sub-r. 2. In *Hughes v. Bank of New Zealand* (1) the question was whether, in calculating the profits

(1) [1938] A. C. 366.

(2) (1933) 103 L. J. (K. B.) 29 ;
18 Tax Cas. 157.

of the London branch of the bank for the purposes of taxation under case I, by setting off expenses against receipts, it was right to include on the receipts side the interest on certain investments, the proceeds of which were, by statute, exempt from tax. In *Sinclair v. Cadbury Brothers, Ltd.* (1) the question arose, in reference to r. 5, sub-r. 1 of the rules applicable to cases I and II of sch. D., whether the assessment must be made excluding the annual value of certain lands notwithstanding that they were, by a statute of 1660, exempt from every form of taxation and, therefore, could not be charged to tax under sch. A. In the present case the method of computation contended for by the Crown is right.

[VISCOUNT SIMON. Why does the existence of exempted income affect the application of r. 3? Does the mere fact that it is included as an item in the computation of the profits charged under r. 3 amount to charging it with tax? The real question to be determined is whether, on the true construction of the rule, there has been any error or mistake in the case of this society which holds in its life assurance fund investments exempt from income tax, and, further what is the right decision in view of the fact that the revenue has, in effect, made the concession that the existence of the exempted income makes a difference to the calculation.]

The point of view for which the Crown has so far contended may be described as the "arithmetical proportion" point of view, as against the "notional figure" point of view which would take no account at all of the exempted income as affecting the calculation. In the Court of Appeal the Crown did not contend for the latter but the House is not being asked to decide in favour of the "arithmetical proportion" if it does not think it right. The "arithmetical proportion" gives the taxpayer something (i.e., the relief which the Crown was prepared to concede) while the "notional figure" would not. However, on the issue which has hitherto divided the parties, the word "income" in a taxing statute generally speaking means taxable income and, apart from authority, the natural way of going about the matter in the present case would seem to be the one adopted in Example 2 to strike out the investments not affected by tax before applying the ratio. [They referred to *Hughes v. Bank of New Zealand* (2); *Ormond Investment Co., Ltd. v. Betts* (3), *Inland Revenue Commissioners*

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18 Tax Cas. 157.

(2) [1937] 1 K. B. 419, 425, 427,
450, 454; [1938] A. C. 366, 370.

(3) [1928] A. C. 143, 154.

H. L. (E.) *v. Dalgety & Co., Ltd.* (1) and the Finance Act, 1940, s. 21, sub-s. 3.]

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R. Hills following. The origin of r. 3 lies in s. 15 of the Finance Act, 1915, which was designed to deal with the difficulty of getting income tax from a life assurance company resident abroad but having a branch in the United Kingdom, and of arriving at the figure of the annual profits of the branch. The solution was found by taxing a figure "deemed to be profits," arrived at by a particular formula. The relief in respect of the exempted securities was only granted by the Crown after the decision in *Hughes v. Bank of New Zealand* (2). The formula only applies to an assurance company's own income. If income received by it as trustee were carelessly included in its return, the Crown would not include it in the calculation under the formula.

Tucker K.C. and *Scrimgeour K.C.* for the respondents. Till the start of the war of 1914 income tax was not a serious burden and there were few decisions relating to it but it had emerged that life assurance companies were in a special position, since their profits cannot be found by looking at a single year: see *Revell v. Edinburgh Life Insurance Co.* (3). The Finance Act, 1915, ss. 14 and 15 made comprehensive provisions to deal with the difficulties which had arisen. The present r. 3 of the rules applicable to case III of sch. D. of the Income Tax Act, 1918, had its origin in s. 15. An important effect of r. 3, sub-r. 1, is that under it foreign income of a company resident abroad is to be "deemed to be profits" within sch. D., whereas previously this was not so. What is being charged is not profits but income. Moreover, it is to be "charged under this case," i.e., case III and all the charging portions of case III deal with income of investments as such. The taxpayer cannot be assessed under case I. Only r. 3 gives validity to the charge. Thus something was made liable to tax which was not liable before, and it is essential to determine to what extent it is liable. If, say, it were to be taxed to the extent of one-quarter, it follows that the other three-quarters must not be taxed. In applying the rule, sub-r. 4 is as important as sub-r. 3. The respondents' contention as to the proper method of calculation in this case may be illustrated as follows: (a) Assume that the investment income of the respondents' life

(1) [1930] A. C. 527.

(3) (1906) 5 Tax Cas. 221.

(2) [1938] A. C. 366.

assurance fund (other than the annuity fund) was as follows : H. L. (E.)

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Income from non-British investments	450,000 <i>l.</i>	INLAND
Income from British investments	50,000 <i>l.</i>	REVENUE
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Total income	500,000 <i>l.</i>	MISSIONERS

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(b) Assuming that the total liability under all the respondents' life policies was 4,000,000*l.* of which 1,000,000*l.* represented the liability under United Kingdom policies, then the taxable proportion of the respondents' total investment income of 500,000*l.* for the purposes of r. 3, sub-r. 2, would be one-fourth, viz., 125,000*l.* (c) If all the British investments were of the kind which gave no exemption from tax in respect of the income arising from them, then the respondents would, in the first place, be charged to tax by deduction or otherwise under various provisions of the Income Tax Acts, other than r. 3, at 10*s.* in the pound on its 50,000*l.* British investment income. This gives a primary liability to tax of 25,000*l.* (d) A further assessment to tax now falls to be made under r. 3, sub-r. 2, and the next step is to calculate that liability. As already stated, this is ascertained by taking one-fourth of the total world income thus :

One-fourth of the 50,000 <i>l.</i> British investment income ..	12,500 <i>l.</i>
One-fourth of the 450,000 <i>l.</i> non-British investment income	112,500 <i>l.</i>
	125,000 <i>l.</i>

This 125,000*l.* is then charged under r. 3, sub-r. 2 with tax at 10*s.*, namely 62,500*l.*
But, under the provisions of r. 3, sub-s. 4, there is then to be deducted the tax already borne by deduction or otherwise on the British investment income as shown in (c), above, viz. : 25,000*l.*

Net tax payable under r. 3 sub-r. 2	37,500 <i>l.</i>
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(e) The total tax liability of the respondents under all heads is, therefore :

Tax payable on the investment income by direct assessment under r. 3, sub-r. 2	37,500 <i>l.</i>
Tax payable by deduction or otherwise on the British part of the total investment income under other provisions of the Income Tax Acts	25,000 <i>l.</i>
Total tax payable	62,500 <i>l.</i>

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(f) The rival views as to the proper result when the whole of the above mentioned British investment income is derived from "tax exempt" investments can now be illustrated. The appellants, on the one hand, contend that since, under r. 3, sub-r. 2, the charge is primarily based on the total world investment income of 500,000*l.* and that, since this total includes 50,000*l.* tax exempt income, full effect will be given to the exemption of the tax exempt income by deducting the whole of such income from the 500,000*l.*, so preventing it from being taken into account either directly or indirectly in charging the life assurance business profits of the respondents under r. 3, sub-r. 2. They also contend that, as no income tax will be charged on the exempted income by deduction or otherwise under any other provision of the Income Tax Acts, because of the express exemptions, their method consequently gives full and complete effect to the exemption. (g) Expressed in figures the appellants' method works out as follows :

Total world investment income	..	..	..	..	500,000 <i>l.</i>
Deduct the tax exempt income	..	..	..	..	50,000 <i>l.</i>
This leaves					450,000 <i>l.</i>
Charge tax under r. 3, sub-r. 2, at 10 <i>s.</i> in the pound on one-fourth of this 450,000 <i>l.</i> viz., 112,500 <i>l.</i>	..	..	..	..	56,250 <i>l.</i>
Although r. 3, sub-r. 4, then requires a deduction from this tax of any tax paid by deduction or otherwise on the 50,000 <i>l.</i> exempt income, ex concessis no such tax will have been paid. The deduction under r. 3, sub-s. 4, is, therefore	..	..	..	..	Nil.
Total tax payable					56,250 <i>l.</i>

(h) On the footing that the total tax payable by the respondents, if they had no tax exempt investments, would have been 62,500*l.* as in (e) above, the appellants would restrict the amount of tax to be repaid to the difference between that sum of 62,500*l.* and the 56,250*l.* shown in (g) above. They would, therefore, repay to the respondents tax amounting to 6,250*l.* only. (i) On this result, the practical effect is that by changing the respondents' investments in such a way that investments formerly producing 50,000*l.* income taxable at 10*s.* are now represented by investments producing a similar income of 50,000*l.* wholly exempt from tax, the respondents, instead of saving the full 25,000*l.* tax thereon, save only one-fourth thereof, namely 6,250*l.* (j) The above figures show clearly that if the appellants' method is accepted, the exemption from tax

of the 50,000*l.* income is indirectly destroyed to the extent (on the above assumed figures) of three-fourths thereof and that the appellants' method amounts to an assertion that, because exemption from tax under other charging provisions on the whole 50,000*l.* has to be given, they are entitled to increase the amount of tax otherwise chargeable under r. 3 to the corresponding extent of three-fourths of the tax from which exemption is so given. (k) Such a result offends against the principle laid down in *Sinclair v. Cadbury Brothers, Ltd.* (1); see also *Stevens v. E. Boustead & Co.* (2). The respondents' contention as to the proper method of ascertaining their tax liability is based on a similar principle to that of *Sinclair's* case (1). The method adopted by the Court of Appeal was correct, whereas that of the appellants is wrong because it is an attempt to ignore the exemptions, thus indirectly charging more of the foreign or non-British income than r. 3 permits, by making the respondents pay on the income of their other securities which have not been brought into the United Kingdom, and should be exempt from taxation imposed here. One cannot do indirectly that which one cannot do directly and, since the charge in the rule rests only on foreign income, it follows that the balance of that income is not to be taxed. The exemptions from income tax contained in the relevant statutory provisions are absolute and cannot be qualified or restricted by the manner in which any of the provisions of r. 3 are applied. If the income derived by the respondents from the exempted investments is not deducted from the portion of the investment income directed to be charged under r. 3, sub-r. 2, full effect will not be given to the exemption of the respondents from liability to income tax in respect of the income from the exempted investments. In view of that exemption from liability to tax the respondents are entitled, for the purposes of r. 3, sub-r. 4, to treat the income from the exempted investments as income in respect of which it has been charged to tax by deduction or otherwise; they are not to be in a worse position than if they had, in fact, been charged in respect of that income. It has been suggested that no relief at all should be granted and that r. 3 is concerned with a mere notional figure, but even if notional profits are to be ascertained in a conventional way, tax-exempt securities will still be taxed unless, when they are being assessed, the respondents are given the benefit of their tax exemption.

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(1) 103 L. J. (K. B.) 29;
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(2) [1918] 1 K. B. 383.

H.-L. (E.) Otherwise they gain no advantage from the purchase of tax-free securities, not in the United Kingdom because no allowance is made in their assessment, and not elsewhere, since an assurance company with its head office abroad would, in any event, escape liability. The respondents are entitled to the same benefits under r. 3, sub-r. 4, as those who have paid tax by deduction in England. Moreover, when notional profits are being sought, interest and such items must be excluded from the calculation. If no relief at all were given there would be a charge on exempt investments. [They referred to *Fry v. Burma Corporation, Ltd.* (1); *Hughes v. Bank of New Zealand* (2); the Finance (No. 2) Act, 1915, s. 30; the Finance Act, 1940, s. 21 and the Income Tax Act, 1918, s. 33, sub-s. 1 and r. 15 of the rules applicable to cases I and II of sch. D.]

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Sir Frank Soskice S.-G. in reply. It is clear that r. 4, sub-r. 1, is mandatory, provided there is room left for such a tax by sub-r. 4. It is not alternative. The two sub-rules are contemplating a different basis of assessment. Further, the conceptions of tax exempted and tax deducted are not the same. The analogy between this case and *Sinclair v. Cadbury Brothers, Ltd.* (3) does not hold water. Neither that case nor *Hughes v. New Zealand Bank* (2) helps the respondents. It is not proposed to address the House on the question whether the wording of r. 3 is such as not to permit any deduction at all. The Crown does not, in any event, seek an order putting the respondents in a worse position than the order of the court of first instance.

THE HOUSE took time for consideration.

Mar. 31. VISCOUNT SIMON. My Lords, when the present appeal reached your Lordship's House a curious, and somewhat embarrassing, situation was disclosed. In the courts below, and before the special commissioners, it seems to have been assumed, both on the side of the appellants and on the side of the respondent society, that the application of r. 3 to the latter was in some way affected by the existence of this exempted income, and that the question between them was: What was the proper method of making the adjustment called for on this account? But, in the course of the argument before

(1) [1930] A. C. 321; 15 Tax Cas. 113, 120.

(2) [1938] A. C. 366.

(3) 103 L. J. (K. B.) 29; 18 Tax Cas 157.

us, the House invited the Solicitor-General to explain why the calculation under r. 3 was affected by the fact of exempted income at all. A good deal of the subsequent discussion revolved around this point and consequently your Lordships have now to decide two questions, first, what is the proper construction and application of r. 3 when an assurance society which falls within that rule holds investments exempt from income tax among the investments of its life assurance fund; and, secondly, what is the right decision in the case now before us where the Revenue has, in effect, made the concession that the existence of exempted income makes a difference to the calculation?

The present r. 3 had its origin in s. 15 of the Finance Act, 1915 (5 & 6 Geo., c. 62). As Mr. Hills pointed out to us, before the Act of 1915 there was much difficulty in getting income tax from a life assurance company resident abroad with a branch here. Such a company could avoid United Kingdom income tax on its income from investments, even though it had a branch in the United Kingdom, by so arranging its affairs that its investments were foreign investments, the proceeds of which were not caught by United Kingdom income tax. It is true that the company might be regarded as carrying on in this country a trade through its branch, but there was much practical difficulty in arriving at the figure under case I of sch. D. of annual profits of such a branch for, in the case of life assurance business, the true profits attributable to the branch could not be ascertained in the normal manner, as is shown by provisions in the Assurance Companies Act, 1909 for a quinquennial valuation. Section 15 of the Finance Act, 1915, was, it would seem, aimed at meeting this difficulty, and it did so by providing for a conventional figure, which should be "deemed to be profits," comprised in sch. D., on which a non-resident life assurance company, with a branch in the United Kingdom, would make a contribution to United Kingdom income tax, however it arranged its investments. The provisions now contained in r. 3 of case III call for the use of certain factors in order to arrive at this conventional figure, upon which such an assurance company as the respondent society is required to pay tax in respect of the annual profit of its life assurance business carried on in this country.

The rule itself is expressed in clear terms, and we are not entitled to read into it anything which is not there, unless upon the true construction of the Income Tax Acts as a whole there

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H. L. (E.) is some statutory provision which must be treated as modifying it, in order to give it its true effect. In sub-r. 1 of the rule, there is no justification for reading "any income of the company from the investments of its life assurance fund" as though it ran, "any income of the company from such part of the investments of its life assurance fund as are exempt from income tax." Yet this is the interpretation which is primarily favoured by the Crown. "The investments of its life assurance fund" must mean all such investments and not a residue of them after first subtracting what may be called "exempted investments." Sub-rule 2 directs how the fraction is to be arrived at which is to be applied to the total of such investments, and naturally involves a comparison between two totals, one attributable to the life assurance business as a whole and the other attributable to the United Kingdom part of it. In the present case the proviso to sub-r. 2 was put into operation and the necessary fraction was obtained by the use of it. There is no dispute as to what the proper fraction is in this instance—it is roughly one-twentieth. The language of sub-r. 4 seems to me to be equally clear. Its effect is to secure that the company's contribution by way of tax under the rule shall be abated, or even wiped out altogether, to the extent to which the company is charged to tax independently of the rule. But there is no justification for reading the words "where a company has already been charged to tax" as though they meant "where the company would be charged to tax if the investments it held were not investments the produce of which is exempt from tax." The relief given by sub-r. 4 arises from the company paying tax apart from the rule, not from the company holding exempted investments.

From 1915 to 1938, as I understand, the practice of the revenue, acquiesced in, or at any rate not challenged in litigation, by life assurance companies with their head office abroad and a branch in the United Kingdom, was to charge tax on the conventional sum thus arrived at, treating as immaterial the fact that the life assurance fund might contain investments the proceeds of which were not subject to tax. But in 1938, this House decided the appeal of *Hughes v. Bank of New Zealand* (1), upholding a decision in the Court of Appeal given in December, 1936, when my noble and learned friend Lord Wright was presiding as Master of the Rolls. The point there arising had nothing to do with r. 3 of case III of sch. D., and nothing

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to do with the taxing of life assurance companies. What was being considered was the taxation under case I of a bank resident in New Zealand with a branch in London. The question was whether, in calculating the profit of the branch by setting off expenses against receipts, it was right to include on the receipts side the interest on certain investments the proceeds of which were by statute exempt from tax. If these amounts were included, the result would be nothing short of the taxing of interest which was not to be taxed. The issue is made exceedingly clear by examining the statement of debits and credits printed in Lord Thankerton's opinion (1) and by studying his subsequent observations. In the Court of Appeal Lord Wright had said (2): "It would be rather deplorable if, notwithstanding what I regard as the clear language of s. 46, the owner, not being ordinarily resident in the United Kingdom, was still taxed on the interest as part of his trading profits, and in my view that is not the true construction of the section. . . . If they are not taxable at all, then obviously they can neither be charged under case III of sch. D. nor under any case of sch. D. at all." Read in the light of the issue before him, the words of my noble and learned friend, and the decision of this House, do not, in my opinion, help the respondent society, and consequently do not call for any change in the practice previously adopted as correct in applying r. 3 of case. III. In the *Bank of New Zealand* case (3) what was in issue was the taxing of receipts which were exempt from tax. In the application of r. 3, the thing to be taxed is not, in whole or in part, exempted receipts, but is a conventional or notional sum—calculated, it is true, by the use of figures which might include the proceeds of exempted investments—but a sum "deemed to be profits," to be charged as such, without any deduction save that provided for in sub-r. 4. The other decision which was thought to be helpful to his case by Mr. Tucker was that of *Sinclair v. Cadbury Brothers, Ltd.* (4), where it was held, in reference to r. 5, sub-r. 1, of the rules applicable to cases I and II of sch. D., that the assessment of profits of Cadbury Brothers, Ltd. must be made by excluding the annual value of certain lands, notwithstanding that these lands of the taxpayer were, by a statute of 1660, exempt from every form of taxation, and, therefore, could not be charged to tax under sch. A. To do otherwise would be to impose tax on

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(1) [1938] A. C. 366, 371.

(2) [1937] 1 K. B. 419, 430, 431.

(3) [1938] A. C. 366.

(4) 103 L. J. (K. B.) 29;

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an income which was, in terms, not to be taxed. This decision also does not, as it seems to me, afford guidance in the present case, for the reason already indicated.

Once it is accepted that r. 3 of case III is not one which taxes income from investments, whether exempted or not, but one which taxes a conventional sum calculated as the rule directs, it becomes reasonably clear that the sum to be taxed is not varied by inquiring whether one of the elements in the calculation contains income from exempted investments. If variation is required on this ground, it must be provided by legislation. Section 21 of the Finance Act, 1940, ought not, I think, to be read as establishing that the effect of the previous law was otherwise than as above stated.

As I am differing from the Court of Appeal, when Somervell L.J. delivered the judgment of the court, I must indicate why, with the greatest respect to the lord justice, I find myself unable to accept his reasoning. He points out (1) that sub-r. 4 of the rule permits a set-off, against the charge on what is to be "deemed to be profits," of the whole of the tax charged, by deduction or otherwise, in respect of the company's life assurance business, and this set-off may be sufficient to extinguish the charge under the rule altogether. The argument then proceeds thus: If the source of the set-off was tax borne by investments subject to tax, the set-off would be effective in reducing or might even extinguish the charge under the rule. If, however, these investments were changed into exempted investments, there would be nothing to set-off. This is true, but I cannot agree that such a result amounts to taxing indirectly the exempted investments. The resulting tax flows from the language of the rule, which authorizes a reduction of the tax on the sum arrived at only if contributions to United Kingdom income tax have been made from other sources. In my opinion, therefore, no reduction of liability on the ground that exempted investments enter into the calculation is called for. But inasmuch as the Crown is merely seeking the reversal of the order of the Court of Appeal, the motion to be put to the House should be that the appeal be allowed.

My Lords, my noble and learned friend, LORD NORMAND, who is not able to be here this morning, authorizes me to say that he concurs in this opinion.

LORD WRIGHT. My Lords, I have considered in print the

(1) [1946] 1 All E. R. 528, 530.

opinion which has just been delivered by my noble and learned friend, Viscount Simon, and I agree with it. The question is what effect is to be given to r. 3 of case III, sch. D. and the incorporated statutory regulation. The provisions of the rule are set out by my noble and learned friend, and I do not repeat them, nor do I recapitulate the facts which he has set out. It was stated by the counsel for the Crown that up to 1938 the practice was to treat the rule as a self-contained provision, enacted in 1915 and directed to secure that non-resident foreign and colonial assurance companies should bear some share of taxation for the benefit of the British revenue in respect of the part of their business carried on at their English branch. As it was difficult to assess their profit in the ordinary method, r. 3 was devised as a rough and ready way of imposing some tax on their British profits by assessing a definite proportion of their income from the securities of their life assurance fund. The proportion was arrived at by a ratio based on the comparison between one part of their liability (which may be described as British liability) that is their liability on life assurance policies effected on proposals made in Britain or of which the holders are in Britain and the total amount of their liability on all life assurance policies. This is a conventional charge; the ratio which in this case is roughly one-twentieth of the total premium receipt on life assurance business is fixed and artificial. In the year of assessment 1936/1937, this ratio when applied to the total sum of the life assurance fund, gave a figure of 230,684*l.*, as the British income of the respondent society on the basis directed by r. 3. No specific investments were taxed. The rule provided that the income from the fixed specified percentage of the securities in question was "to be deemed to be profits comprised in the schedule" (sch. D.) "and was to be charged under case III of that schedule." It was, therefore, a charge under the case on a notional figure deemed to be a figure of profit. No doubt it was possible to give a list of the securities which formed at any particular time the life assurance fund and to value them individually and add up the total. But there was nothing to show which of these securities were to be deemed to fall within the twentieth portion of the securities. Of the securities comprising the life assurance fund there were certain investments amounting in value to 72,354*l.* the income of which was specially exempted from tax. They have been specified by the noble and learned Viscount in his opinion. No allowance was made in the assessment under r. 3

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of case III on account of these exemptions. That was not at first questioned by the respondent society. But after the decision of this House in *Hughes v. Bank of New Zealand* (1), the respondents claimed that these exempted securities should have been segregated and the total amount of the income from them in the year of charge deducted from the total "British" income so that the charge under r. 3 should have been proportionately reduced. The respondents accordingly made a corresponding claim for repayment of part of the tax so assessed on the ground of error or mistake under s. 24 of the Finance Act, 1923, in its return. But, as the hearing of the appeal before your Lordships proceeded, it was pointed out by my noble and learned friend, Viscount Simon, that the real question to be determined was whether on the true construction of r. 3 there had been any error or mistake. To decide that it was necessary to construe r. 3, and I think that it has now been made clear that the rule was correctly applied. Its application was not affected by the decision in the *Bank of New Zealand* case (1). In that case r. 3 was not considered: it was not necessary to consider it at all. Rule 3 deals with the life assurance fund of assurance companies. The decision just referred to deals with a bank. The exemption under s. 46 of the Income Tax Act, 1918, directly and plainly applied to the specified securities in question. But r. 3 as already explained, was not a plain or simple clause of exemption as were the clauses considered in the *Bank of New Zealand* case (1). It was on the contrary a charging provision intended to charge the assurance company on the basis of a fixed percentage of the total income. That was merely a convenient mode of imposing some charge on the assurance company in consideration of the privilege it enjoyed in trading in this country. The charge was a tax on the investment income only as a machinery to tax the general profits of the British business, and as a manner of measuring the charge by an arbitrary figure derived from a percentage of the investment income. In this connexion it was not material to distinguish between exempted and unexempted income. All that was needed was a yardstick. This is borne out by the actual language of r. 3. It is positive in its terms: the only qualification is to be found in sub-r. 4, which provides for a set off of charges on the assurance company outside r. 3. The effect of the sub-rule is to secure that the fixed and conventional assessment under r. 3 is to be reduced proportionately

(1) [1938] A. C. 366.

if the company has already been charged apart from the charge under r. 3. As my noble and learned friend has pointed out, the decision in the *Bank of New Zealand* case (1) affords no guidance in the present appeal, nor do the expressions which he quotes from my judgment in the Court of Appeal (2). What I said there was quite correct in respect of the issues then before the court and of the securities then in question. The special provisions of r. 3 were not there relevant and were not before either the Court of Appeal or this House. In truth, as already observed, the charge under r. 3 was not a charge on the specified investments except in form: it was an artificial mode of charging the general profit of the British business. Rule 3 not being qualified except for sub-r. 4, and being a charging section must receive its appropriate effect from the court, notwithstanding an apparent but not real conflict between it and s. 46 of the Income Tax Act, 1918. The difficulties involved in attempting to reconcile r. 3 and s. 46 and bring them both into operation, are illustrated by the judgments in the tribunals below in the present case. But these difficulties do not arise if, as I think, r. 3 is the dominant and over riding enactment in this regard. If the court has failed to give effect to the purpose of the legislature, it is for the latter to cure the error. However, as Viscount Simon has pointed out, the only amendment of the law, namely, that contained in s. 21 of the Finance Act, 1940, is not retrospective and cannot help the court in deciding this appeal. For these reasons and for the reasons explained by my noble and learned friend, I shall concur in the motion which he will put to the House.

LORD PORTER (read by LORD SIMONDS). My Lords, the decision in this case turns on the true construction of r. 3 of the rules applicable to case III of sch. D. of the Income Tax Act, 1918. The facts have already been stated and the rule has been quoted in full so that it is unnecessary for me to repeat it. The revenue authorities say that the terms of the rule are plain: its object is to determine what are to be regarded as the taxable profits of a non-resident assurance company with a branch in this country. Tax, in their contention, is not imposed upon the income of its investments in the case of such a company: it is imposed upon a purely notional sum of profits. They point out that if an assurance company is resident in this country they can either assess it under case III

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H. L. (E.) of sch. D. on the income from its investments or under case I of that schedule upon the profits of the business which it carries on and agree that if the former alternative is adopted the interest derived from its tax-exempt investments must be excluded in computing what its income is. Indeed, I understood them to be prepared to concede that the exclusion of such interest cannot be avoided if the alternative method of taxing the company on its profits is adopted, since it is not permissible by any device to levy tax on such investments either directly or indirectly: see *Hughes v. Bank of New Zealand* (1). Similarly if tax is being levied on profits, the taxable value of tax free land must be excluded from the credit side of the account in ascertaining what these profits are: see *Sinclair v. Cadbury Brothers, Ltd.* (2). In each of these cases, however, the object was to determine what sums were to be brought into computation in ascertaining the actual profit: in the former case the profits of the English branch of a non-resident company charged not on a conventional basis, but on the actual profits earned by that branch in this country—in the latter, the actual profits of a company which was resident here. In neither case did notional profits come in question, nor, indeed, is there any very obvious reason for applying these principles to notional profits calculated by adopting, in the case of a non-resident company with a branch here, some conventional method of finding the proportion which the income of the English branch bears to the income of the business of the company as a whole. Where, as in this case, notional or conventional profits alone come in question your Lordships have to decide whether the possession of tax-exempt investments has any effect in reducing the quantum of those profits and if it has, to determine the extent of that reduction.

The respondents, on their part, assert in the first place that r. 3 does not prescribe a method of calculating profits under case I of sch. D., but on the contrary the word "profits" in the rule merely means income which is subject to tax under case III. Such income, they say, is that which is set out under the specific heads to be found in r. 1 of the rules applicable to that case under the sub-headings (a) to (f), and the matters included under those heads are confined to investment income and nowhere deal with profits as such. In support of this argument they point to the phraseology used in r. 3. What is

(1) [1937] 1 K. B. 419; [1938] A. C. 366.

(2) 103 L. J. (K. B.) 29; 18 Tax. Cas. 157.

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being taxed, in their submission, is "income" not "profits": it is only deemed to be profits and not even profits of any kind but profits "comprised in this schedule" and "charged under "this case." Nor, they say, can the revenue authorities escape this result by attempting to assess the income tax payer under case I in respect of profits as an alternative to charging him under case III. Rule 3, they argue, alone gives validity to the charge and no alternative method is permitted. If, then, it is income from investments which is being taxed in this country and the company upon which the charge is made holds tax exempt investments, that company, it is maintained, should have the benefit of the exemption to the extent to which it is assessed to tax, otherwise it is charged on its tax-exempt investments either directly because they form part of its income or at any rate indirectly in being compelled to pay upon the income of its other securities which have not been brought into this country and should be exempt from taxation imposed here. This criticism would, I think, have force if applied to such circumstances as existed in the *Bank of New Zealand* (1) and in the *Cadbury* (2) cases (supra) in both of which the tax was imposed on actual profits and the tax-free asset was part of the assets of the branch or company upon whom it was imposed. But it has no application to a case where the profits or income, the subject of charge, is a notional sum calculated in a conventional way nor do I think it matters whether it is or is not established that the tax-exempt investments are assets of the branch carried on in this country. The stress of the respondent's argument was laid on the words "shall be charged under "this case," i.e., under case III and it was said that those words mean that it is to be charged on the income of investments as such. I cannot think so. In the first place, it is not accurate to say that case III is concerned only with investment income. The general description of the content of that case in para. 2 at the beginning of that schedule shows a wider ambit. There the field covered by case III is delineated in the words "Tax in respect of profits of an uncertain value and of "other income described in the rules applicable to this case." In the face of such a demarcation of the extent of the tax, there is no justification for limiting it to a charge on investment income. To do so would be to give effect only to the latter half of the definition and to confine the attention to "other income

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(1) [1938] A. C. 366.

(2) 103 L. J. (K. B.) 29 ; 18
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"described in the rules applicable to this case," whilst neglecting the opening words "profits of an uncertain value." In any case when the rules speak of income being taxable under case III they mean, I think, no more than that tax, being imposed under the rules of that case and there only, must be charged under that case. It does not mean that the charge is imposed on the income from investments and not on profits.

But, say the respondents, let it be granted that the rule means no more than that notional profits are to be ascertained in a conventional way and then subjected to tax, nevertheless the Crown will be charging tax upon tax-exempt securities if we are not given the benefit of all our tax-exemption when we are being assessed in respect of the profits of the English branch. Unless the taxpayer gets the benefit of this exemption when assessed in this country he will, they maintain, gain no advantage from his purchase of tax-free securities: not in this country because no allowance is made in his assessment here: not elsewhere because an assurance company not having its head office in the United Kingdom would in any case escape liability unless, of course, the tax were deducted at the source. Sub-rule 4 it is said, gives a benefit to those who have paid tax by deduction in England and therefore those who hold tax-free investments should receive a like benefit by being treated as if they had paid tax on those securities: otherwise they are not enjoying to the full the benefit of the exemption. The answer is, I think, that they receive such benefit as they are given by the rule and if no exemption is thus granted, the matter if this result is not intended, may be one for the legislature but is not one with which your Lordships can deal. No doubt this construction of the rule if adopted may in certain circumstances lead to an anomalous position, e.g., if a non-resident company should have invested all its life assurance fund in tax-exempt securities, it would pay tax on the conventionally apportioned sum without any reduction and would be no better off than if the statutory proportion were wholly liable to tax. I agree that this is a hardship but it does not entitle your Lordships to disregard the plain meaning of the rule. So long as the words are in their present form the result must be looked on as the price which non-resident assurance companies have to pay for engaging in business in this country.

I would only add that even if the arguments for the respondents were accepted in principle I find difficulty in seeing why the whole of the tax-exemption should be regarded as owed to

the English branch. In the case of a bank such as the Bank of New Zealand and in circumstances such as existed in that case any quantity of tax-free securities might have been held by the business as a whole but exemption was only given to the English branch in respect of those held as part of that branch's assets and brought into account in calculating the amount of profits earned here. Both the *Bank of New Zealand* case (1) and *Cadbury's* case (2) do, in my opinion, decide that, when actual profits are being dealt with, the exempted interest or item must not be included as a credit item in the company's account when determining its profits. It is argued that when, in the present case, notional profits are being sought for, interest or items of that kind must upon similar principles be excluded from the calculation of such profits. The analogy however, in my view, if it applies at all only applies in a case where the quantum of actual not notional income is being ascertained. In the present case the only actual income which forms a factor in ascertaining the amount of profits is that mentioned in r. 3, sub-r. 2, i.e., the total income from the investments of the life assurance fund. If, then, that sub-rule requires the interest derived from tax-free investments to be deducted, the logical course would be to deduct it from the actual total investments of the company which are exempt from tax. I cannot for myself see why it should be deducted from a sum which does not represent any real income or profit but is merely arrived at by a conventional calculation adopted for the purpose of estimating an otherwise almost incalculable sum. It is not as if the tax-exempt investments were assets of the English branch or as if indeed it were possible to separate the assets of the branch from those of the company as a whole—no argument as to or evidence of such a position was presented, and the method of calculating the profit adopted in r. 3, sub-r. 2, would prevent such a suggestion being put forward. In any case, however, I think the wording of the rule too plain to justify even the modified relief which the Crown have been prepared to give since the decision in the *Bank of New Zealand* case (1) was decided. I agree with your Lordships that the appeal should be allowed and the judgment of Macnaghten J. restored. This is the order asked for by the appellants and it is not, I think, material that the reasoning of your Lordships, including my own, would lead to the withdrawal even of the

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LORD SIMONDS. My Lords, speaking for myself, I also concur.

Appeal allowed.

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Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Bell, Broderick & Gray.*

[HOUSE OF LORDS.]

H. L. (E.)* WEATHERLEY APPELLANT ;
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WEATHERLEY RESPONDENT.
Mar. 14, 31.

Divorce — Desertion — Refusal of sexual intercourse — Spouses living in matrimonial home—Matrimonial Causes Act, 1937 (1 Edw. 8, & 1 Geo. 6, c. 57), s. 2.

The mere refusal of sexual intercourse by one of the spouses cannot constitute desertion within the Matrimonial Causes Act, 1937, s. 2.

Jackson v. Jackson [1924] P. 19 approved.

Decision of the Court of Appeal (174 L. T. 346) affirmed.

APPEAL from the Court of Appeal (Tucker L.J. and Evershed J., Scott L.J. dissenting).

The facts, stated by Viscount Jowitt L.C., were as follows : This was a husband's petition for divorce based on the ground of desertion by the respondent wife. The petition was dated February 22, 1945, and it was, therefore, necessary to show that the desertion had lasted for at least three years, from February 22, 1942. The parties were married at the Register Office in Bromley, Kent, on May 17, 1941, the husband being then aged twenty-two, a sergeant in the Royal Air Force, and the wife being a spinster of thirty years of age, the daughter of a man called Pascuiti. The nationality of the wife before her marriage was not stated. They lived in a two-roomed flat at

* *Present* : VISCOUNT JOWITT L.C., LORD WRIGHT, LORD SIMONDS, LORD UTHWATT and LORD NORMAND.

286, Kent House Road, of which the wife was the tenant. The husband was, in the early days of the marriage, in the habit of spending the time when he was on leave with his wife and her flat became the marital home. In the early days of the marriage normal sexual intercourse took place, and this continued up to October, 1941, whenever the husband got leave. When the husband went home on leave in November, 1941, the wife said that she had prepared another bed for him. She said she did not want any further resumption of marital relations. She said that she knew that she was being selfish but (quoting from the evidence) "she thought this sex business was horrid and beastly" and she did not want any more of it." She added that she realized it was awfully hard on her husband, but if he wanted that sort of thing he could have it with some other woman. As a result the husband had to sleep in another bed and at some later date, which was not specified in the evidence, in another room. In all other respects they continued living together in the flat as a normal married couple. They had their meals, which were prepared by the wife, together, and they went out together to clubs and entertainments. Although from time to time thereafter the husband asked the wife to change her mind and to allow him sexual intercourse, she never consented to do so. They continued, however, to live together at the marital home. The trial judge, Bucknill J. (as he then was) heard the case in October, 1945, and dismissed the petition. The Court of Appeal (Scott and Tucker L.JJ. and Evershed J.) dismissed the appeal, Scott L.J. dissenting. From that decision an appeal was brought to the House of Lords.

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Crispin for the appellant (the husband). The respondent wife in law deserted the husband without cause in November, 1941, and continued to desert him for three years immediately preceding the presentation of the petition. The fact that the injured spouse was willing to continue social relations during that period and did continue them does not prevent the time of desertion from running since the true test in law is the state of mind of the defaulting spouse. Examining the nature of marriage, sexual intercourse is fundamental to it. It is the essential of every system of marriage. The social and spiritual side of marriage is in many systems treated as less important, since these may exist in a relationship which has no connexion with marriage. Two of the matters referred to in the marriage service in the Book of Common Prayer depend on sexual inter-

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course. This aspect of marriage was fundamental from the earliest times and was stressed alike in Genesis and the New Testament. Although St. Paul and St. Augustine tended to subordinate the physical side to the spiritual, in modern times there has been a greater appreciation of the importance of the former. Refusal of sexual intercourse is a breach of the fundamental obligation of marriage and, therefore, constitutes desertion. It is in harmony with this that non-consummation of marriage is now a ground for a decree of nullity. By s. 5 of the Matrimonial Causes Act, 1884, a respondent who failed to comply with a decree for restitution of conjugal rights was thereupon deemed to have been guilty of desertion without reasonable cause and the petitioner might forthwith proceed for judicial separation: see *Herod v. Herod* (1). That case is the starting point of the appellant's argument. The relevant authorities before the Matrimonial Causes Act, 1937, are the following: *Forster v. Forster* (2); *Orme v. Orme* (3); *D. v. A.* (4); *Williams v. Williams* (5); *Fitzgerald v. Fitzgerald* (6); *Sickert v. Sickert* (7); *Synge v. Synge* (8); *Dickinson v. Dickinson* (9); *Wily v. Wily* (10); *Davis v. Davis* (11); *Powell v. Powell* (12) and *Pulford v. Pulford* (13). *Jackson v. Jackson* (14) was wrongly decided. After the Act the relevant authorities are *Smith v. Smith* (15); *Littlewood v. Littlewood* (16); *Wilkes v. Wilkes* (17) and *Scotcher v. Scotcher* (18). In Scotland divorce has a longer history. At the Reformation in 1560 the Kirk assumed jurisdiction to deal with matrimonial causes and in 1573 an Act was passed under which divorce could be granted for desertion. Divorce in Scotland is now governed by the Divorce (Scotland) Act, 1938. Among the Scottish authorities, the appellant relies on *G. v. G.* (19) and *Goold v. Goold* (20).

Holroyd Pearce K.C. and *William Latey* for the King's Proctor, at the invitation of the House. The problem raised in this case is that of wilful refusal of intercourse in its simplest

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| (1) [1937] P. 11, 32. | (12) [1922] P. 278. |
| (2) (1790) 1 Hagg. Con. 144. | (13) [1923] P. 18. |
| (3) (1824) 2 Add. 382. | (14) [1924] P. 19. |
| (4) (1845) 1 Rob. Ecc. 279, 298. | (15) [1940] P. 49. |
| (5) (1864) 3 Sw. & T. 547. | (16) [1943] P. 11. |
| (6) (1869) L. R. 1 P. & M. 694. | (17) [1943] P. 41. |
| (7) [1899] P. 278. | (18) [1947] P. 1. |
| (8) [1900] P. 180; [1901] P. 317. | (19) 1923 S. C. 175, 194; [1924] A. C. 349, 365. |
| (9) [1913] P. 198. | (20) 1927 S. C. 177. |
| (10) [1918] P. 1. | |
| (11) [1918] P. 85. | |

form—wilful, deliberate and permanent. The question is : If this is not desertion what more is required—what other ingredient is necessary? For desertion there must at least be an intention to disrupt the married life, to repudiate the marriage obligation as a whole ; forsaking and abandoning are essential. Desertion under the Act of 1937 should be given the meaning established by the judicial decisions binding at the time of its passing. *Jackson v. Jackson* (1) was rightly decided. In the Act, s. 7, sub-s. 1 (a), deals specifically with wilful refusal to consummate as a ground for a decree of nullity, but it is not treated as desertion. The inclusion of it for one purpose imports its exclusion for the other. The fact that refusal of intercourse incidentally disrupts the household does not make it desertion. In this case there are not enough additional facts to turn wilful refusal into desertion. In cases of desertion the parties must always be living separate lives.

The respondent (the wife) was not represented.

THE HOUSE took time for consideration.

Mar. 31. VISCOUNT JOWITT L.C. My Lords, under the Matrimonial Causes Act, 1857, adultery, coupled with desertion without reasonable excuse for two years or upwards, had been a ground upon which a wife could obtain a decree of divorce, and desertion without cause was of itself a ground upon which a sentence of judicial separation could be obtained. The Matrimonial Causes Act, 1937, for the first time, made desertion without cause a ground of divorce if it had continued for three years immediately preceding the presentation of the petition. It is noticeable that in neither of these two Acts was desertion defined. Under these circumstances I think we should first consider what was the state of the law as laid down in the decided cases dealing with the subject of desertion up to the date of the passing of the Act of 1937. In the absence of any statutory definition of desertion I should think it right to presume that the legislature in using that word used it in the understood and accepted sense. My Lords, I find it unnecessary, for the reasons I will give presently, to bring the many decided cases into detailed review : in all of them the judges have declined, and in my view wisely declined, to attempt any definition of "desertion." In this respect I propose to follow their example. On some future occasion it may be necessary that this House should consider some of these decisions, and,

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in particular, should consider whether there is sufficient warrant for the doctrine of "constructive desertion" which from time to time seems to have found favour. In the view which I take no such consideration is necessary for the determination of the present appeal, for it is the fact that in none of those cases before *Jackson v. Jackson* (1) is there anything to suggest that, so long as cohabitation is continued, a mere refusal of sexual intercourse by one of the spouses can constitute desertion. This point actually arose for decision for the first time in *Jackson's* case (1). The actual refusal in that case was a refusal by the husband to sleep with his wife because she insisted on having her little girl with her. The case was argued upon the footing that there had been an unqualified refusal of sexual intercourse and the judgment proceeds on this basis. Duke P. in the course of his judgment states the principle as follows (2): "How does it stand in point of principle? Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation or living apart. It may be a ground upon which the party against whom the refusal is made may decide to go away; and in the case of *Synge v. Synge* (3), in the Court of Appeal, which has been so much pressed upon us, Collins L.J. said that where, upon a refusal of sexual intercourse by one of the spouses, the other had decided to go away, they were living apart by mutual consent. But reflection upon the manifold duties of the married state must, I think, convince any reasonable mind that this refusal of itself by one of the parties, while the parties remain living together and discharging the other duties of the married state, cannot be said to amount to desertion. It is not abandonment; it is not living apart. If it is a refusal of a duty it does not purport to conclude the matrimonial relationship." That case had been acted upon many times between 1924 and the passing of the Matrimonial Causes Act, 1937. I agree with that decision: but even if I had thought it incorrect, I should still have been of the opinion that, when the legislature in the Act of 1937 for the first time made desertion by itself a ground of divorce, it cannot have intended the word "desertion" to bear a meaning which it does not naturally bear and which judicial authority had so recently denied to it.

(1) [1924] P. 19.

(3) [1901] P. 317, 324.

(2) Ibid. 23.

Scott L.J. in his dissenting judgment, states (1) that "marriage, whether it be in an Established Church or in a register office, is to be regarded as a Christian marriage." He therefore proceeds to consider the doctrine of marriage as set forth in the Book of Common Prayer. He finds there stated that one of the causes for which matrimony was ordained was the procreation of children; and so reaches the conclusion that where the wife has, after a time, refused further sexual intercourse with the husband, she has "deserted" the husband, because he regards the mutual rights of sexual intercourse for the purpose of procreation of children as fundamental to the marriage state. I think this a dangerous and fallacious line of argument. It proceeds upon the basis that any fundamental breach of the obligations contracted in Holy Matrimony, as laid down in the Book of Common Prayer, constitutes desertion within the meaning of the Act of 1937. It could not be contended that a marriage which had been duly consummated could be dissolved, because one of the spouses was unable, by reason of some physical infirmity, to procreate children. Yet the consideration which prevailed with the learned lord justice would appear in such a case to be equally valid. The marriage which is contemplated in the Book of Common Prayer is a lifelong union which imposes an obligation on the one spouse towards the other "to love and to cherish till death us do part." The fact is that the law of the land cannot be co-extensive with the law of morals; nor can the civil consequences of marriage be identical with its religious consequences. What marriage means to different persons will depend upon their upbringing, their outlook and their religious belief. We must remember, as Scott L.J. rightly says (1) that marriage, whether solemnized in a church or a register office, whether contracted between Christians or between those who have different or no religious beliefs, must in each case have the same legal consequences: and remembering those things, we shall, I think, find the solution to the question which arises for determination in this case, and in similar cases, not upon a consideration of the Christian doctrine of marriage, as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament.

This further consideration cannot be disregarded. It is, my Lords, most undesirable, save where we are clearly enjoined by statute so to do, to seek to discover or reveal the secret

(1) (1946) 174 L. T. 346, 347.

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intimacies of the marriage bed. If a question arises whether the marriage has been consummated, no doubt this may be necessary. It is not, I think, right that we should do so in cases such as the present. I find it significant in this connexion that the Act of 1937, which provided that a decree of nullity could be pronounced on the ground that the marriage had not been consummated owing to the wilful refusal of the respondent, did not go on to say that a marriage could be dissolved if, when once it had been consummated, further sexual intercourse was withdrawn. If any such doctrine were to be accepted, we might even have to consider, as Evershed J. hinted (1), whether it could be held that there was desertion if sexual intercourse was only tolerated on rare and exceptional occasions.

For these reasons, which are in substance those given by Tucker L.J. and Evershed J. I would dismiss the appeal. I must add that, having had the opportunity of reading the speech which my noble and learned friend Lord Normand is about to deliver, I concur in his observations upon the irrelevance to the present issue of decisions of the Court of Session in Scottish cases. Equally nothing that the House decides upon the meaning of the word "desertion" in the English law of divorce should be taken as relevant to the meaning of that word in Scots law.

LORD WRIGHT. My Lords, I agree. My noble and learned friend LORD UTHWATT, who is not here to-day, has asked me to say that he also agrees with the opinion which has just been delivered.

LORD SIMONDS. My Lords, I also agree.

LORD NORMAND (read by LORD SIMONDS). My Lords, my reasons for thinking that this appeal fails may be very briefly stated. *Jackson v. Jackson* (2) is the only case of those cited in which the question arose for decision, whether persistent refusal of sexual intercourse, without any other conduct on the part of either spouse making for the disruption of the marriage, is desertion, and the decision was that it was not desertion. Nothing intervened between the date of that decision and the passing of the Matrimonial Causes Act, 1937, to cast any doubt on the soundness of the decision. It must, therefore, be

(1) 174 L. T. 346, 352.

(2) [1924] P. 19.

assumed that the legislature in passing the Act of 1937 used the word "desertion" in a sense consistent with the law as expounded in *Jackson v. Jackson* (1).

Certain Scottish cases were referred to by counsel for the appellant. But there are differences between the law of England and the law of Scotland on divorce for desertion which have by no means been removed by recent legislation and which are a result of the different history of the law of divorce in the two countries since the Reformation. The recent cases of *Bell v. Bell* (2) and of *Wilkinson v. Wilkinson* (3), show how the construction of the Divorce (Scotland) Act, 1938, is influenced by the former law in this very matter of divorce for desertion. It is seldom that it can be profitable to cite Scottish decisions on divorce in an English case, or English decisions in a Scottish case. In the present instance the Scottish cases cited certainly afford no help.

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Appeal dismissed.

Solicitors : *Henry, Sydney & Co. ; the King's Proctor.*

(1) [1924] P. 19.

(3) 1942 S. C. 472 ; 1943

(2) 1941 S. C. (H. L.) 5.

S. C. (H. L.) 61.

[HOUSE OF LORDS.]

PRATT APPELLANT ; H. L. (E.)*

AND

NORTH-WEST NORFOLK ASSESSMENT

COMMITTEE AND OTHERS. RESPONDENTS.

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Mar. 13, 17,
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May 16.

Rating — Valuation list — Indefinite postponement of new valuation list—Proposal to amend gross and rateable value of a property—Proposal approved—One of many proposals in rating area—Supposed general rise in values—Valuations over whole area intended with view to proposals for amendment—Validity—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), ss. 19, 37—Rating and Valuation (Postponement of Valuations) Act, 1938 (1 & 2 Geo. 6, c. 19), s. 1—Rating and Valuation (Postponement of Valuations) Act, 1940 (3 & 4 Geo. 6, c. 40), s. 11, sub-s. 3.

By the Rating and Valuation (Postponement of Valuations)

* *Present* : VISCOUNT SIMON, LORD WRIGHT, LORD SIMONDS, LORD UTHWATT and LORD NORMAND.

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Acts, 1938 and 1940, the making of quinquennial valuation lists provided for by s. 19 of the Rating and Valuation Act, 1925, was indefinitely postponed. The result was that in the Docking rural rating area no list had been made since 1934. In 1942, the county valuation committee made a proposal under s. 37 of the Act of 1925 to amend the current valuation list as regarded a house in one of the twenty-nine parishes constituting the Docking rural rating area by raising the gross and rateable value. This was approved by the assessment committee but the owner of the house appealed to the Court of Quarter Sessions, who stated a case for the decision of the Divisional Court. A number of other proposals as to property in four of the parishes had been made and nearly all approved. The county valuation committee was carrying out a systematic inspection and valuation of every property in the rating area with a view to making further proposals so as to raise the general level of assessments in the rating area. The owner of the house contended that the proposal in respect of it was invalid and illegal as being one of a series of proposals which would together amount to a proposal for a new valuation list, contrary to the provisions of the Acts of 1938 and 1940 :—

Held that what was done by the assessment committee and the county valuation committee was authorized by s. 37 of the Act of 1925; whether the proposal stood alone or was one of many and whether the factors which affected the value of the particular hereditament also affected the value of other hereditaments in a greater or less degree or not at all, were irrelevant considerations.

Camberwell Assessment Committee v. Ellis [1900] A. C. 510 distinguished.

Rex v. Horsham and Worthing Assessment Committee [1937] 2 K. B. 408 considered.

Decision of the Court of Appeal [1946] K. B. 93 affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., MacKinnon and Tucker L.JJ.).

This was an appeal from an order of the Court of Appeal, dated November 13, 1945, whereby the appeal of the respondents, the North-West Norfolk Assessment Committee and the Norfolk County Valuation Committee from an order of the King's Bench Division, dated May 4, 1945, in favour of the appellant, Walter Pratt, was allowed. The appellant appealed to the House of Lords. The question was whether or not a proposal to amend the current valuation list for the parish of Heacham in the Docking rural rating area in the county of Norfolk by raising the gross value of a certain hereditament belonging to and occupied by the appellant was a valid and legal proposal. The facts are fully set out in the opinion of Lord Simonds.

Beney K.C. and *Dare* for the appellant.

Simes K.C. and *Harold B. Williams* for the respondents.

The arguments were substantially the same as those presented before the Court of Appeal (1).

THE HOUSE took time for consideration.

May 16. VISCOUNT SIMON. My Lords, I have had the advantage of reading in print the opinion which has been prepared in this appeal by my noble and learned friend Lord Simonds. He has covered the whole ground, and I agree with his reasoning and conclusions. In these circumstances I need do no more than move that the appeal be dismissed with costs.

LORD WRIGHT. My Lords, I also concur.

LORD SIMONDS. My Lords, the question for your Lordships' decision is whether the North-West Norfolk Assessment Committee (whom I will call "the first respondent") were correct in allowing a proposal by the county valuation committee for the County of Norfolk (whom I will call "the second respondent") dated August 17, 1942, to amend the current valuation list for the parish of Heacham in the Docking rural rating area in the county of Norfolk by raising the gross value of a certain hereditament belonging to and occupied by the appellant from 14*l.* to 20*l.* and the rateable value from 8*l.* to 12*l.* This question, which the Court of Appeal has answered in the affirmative, reversing the decision of the King's Bench Division, came before the court upon a special case stated for its opinion under the provisions of s. 11 of the statute 12 & 13 Vic., c. 43, commonly known as Baines's Act. It appears from the preamble to the special case that the dispute thus arose. The second respondent having made the proposal to which I have already referred, the appellant objected to it in writing on December 8, 1942. His notice of objection is annexed to the special case, but the grounds of objection are not there stated. On December 18, 1942, the first respondent heard the proposal and objection and determined to raise the value of the appellant's hereditament in accordance with the proposal. The appellant on January 5, 1943, gave due notice of appeal against this determination to the Court of Quarter Sessions of the county of Norfolk. I think it convenient at this stage to state

(1) [1946] K. B. 93, 97, 98.

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the grounds of appeal as they were there set out. They were as follows : “ (1.) Since the passing of the Rating and Valuation (Postponement of Valuations) Act, 1940, there has been a re-valuation of the greater part of Heacham and proposals numbering 407 have been made which have been heard and determined by the assessment committee and further valuations are in progress with a view to further proposals being made. Although these are individually called proposals the result is in fact a re-valuation of the whole or greater part of the parish revising the basis for the area and as such it is bad in law and ultra vires. (2.) The gross value as determined by the said assessment committee is not in accordance with the definition of gross value contained under s. 68 of the Rating and Valuation Act, 1925.” The first of these grounds has persisted and is in substance the question that your Lordships now have to consider. The second of them has disappeared. Notice of appeal having thus been given, the special case was stated by consent of the parties and by order of Cohen J. pursuant to the provisions of Baines’s Act. Its terms were settled by agreement between the parties and their advisers.

I take the following facts from the special case. The parish of Heacham and the parishes of Snettisham, Dersingham and Ingoldisthorpe are part of the rating area consisting of twenty-nine parishes for which the Docking Rural District Council (which I will call “ the rating authority ”) is the rating authority. The first respondent is the assessment committee for an area which includes this rating area and the second respondent is the county valuation committee for the county of Norfolk established pursuant to s. 18 of the Rating and Valuation Act, 1925, to which I shall refer as “ the Act of 1925.” Section 19 of the Act of 1925 had provided that a new valuation list should be made for every rating area, so as to come into force on April 1, 1928, or on April 1, 1929, and a second new valuation list should be made so as to come into force for every such area on April 1, 1932, 1933 or 1934, and that thereafter new valuation lists should be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force should be a period of five years. But by s. 1 of the Rating and Valuation (Postponement of Valuations) Act, 1938, the third new valuation list was directed to be made so as to come into force on April 1, 1941, and by s. 1

sub-s. 3, of the Rating and Valuation (Postponement of Valuations) Act, 1940, the making of the third new valuation list was further indefinitely postponed by the substitution in the Act of 1938 of a reference to April 1 in the "prescribed year" for the reference to April 1, 1941. By reason of these provisions the second new valuation list for the Docking rural rating area, which came into force on April 1, 1934, was the valuation list in force at all material times. The total number of hereditaments in the said rating area is 6,410 of which number the four parishes specifically referred to contain respectively :

Heacham Parish	..	..	..	980
Snettisham Parish	..	..	..	669
Dersingham Parish	..	..	..	591
Ingoldisthorpe Parish	..	..	..	137

2,377

Each of the said parishes appears in a separate division of the valuation list in accordance with s. 21, sub-s. 2, of the Act of 1925. On August 26, 1940, the rating authority made proposals to increase the assessments of certain houses in the parish of Ingoldisthorpe. In or about the month of December, 1940, the second respondent, being of opinion that the general level of the existing assessments in the said rating area was too low, made proposals to increase the assessments of twenty-two houses in Ingoldisthorpe, seventeen in Heacham and five in Dersingham, in respect of which houses and five others in Ingoldisthorpe the rating authority had already made proposals to increase the assessments but at lower figures. The first respondent on November 14, 1941, approved the proposals of the second respondent. Between December, 1941, and December, 1942, the second respondent made proposals relating to five hundred and fifty-seven hereditaments (including that which is the subject of this appeal) which were situated in the respective parishes as follows :

Heacham ..	..	..	..	..	409
Snettisham	..	..	..	..	82
Dersingham	..	..	..	..	33
Ingoldisthorpe	..	..	..	..	53

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H. L. (E.) The assessments of all these hereditaments, with the exception of eight, two of which stand adjourned, were increased by the first respondent. In addition to making the proposals referred to in para. 6 of the special case the acting county valuation officer on behalf of the second respondent prior to December, 1942, inspected six hundred and eighteen further hereditaments in the said parishes, as follows :

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COMMITTEE.	Heacham ..	..	..	..	..	87
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	Dersingham	..	..	..	..	359
						618

No proposals in respect of these hereditaments had been made pending the result of this appeal except that on March 8, 1944, eight further proposals were made by the second respondent to increase the gross and rateable values of certain hereditaments in the parish of Heacham. The said proposals were approved by the first respondent on March 31, 1944. On July 20, 1942, the following minute was entered by the Docking rural district council in their minute books : " Proposals by county valuation officer.—A further list of proposals made by the county valuation officer acting on behalf of the Norfolk County Council was before the rating committee. Arising from this matter the Heacham parish representative stated there was considerable concern in the parish regarding what appeared to be the omission or delay by the acting county valuation officer in submitting proposals regarding the larger properties and it is recommended that Mr. Chapman be requested to give his observations on this matter." The said Chapman was the acting county valuation officer. On September 11, 1942, the said acting county valuation officer wrote to the Docking rural district council a letter in which he stated : " There are a small number of larger properties which have not yet been dealt with by me as I have not had time to do so but I have endeavoured throughout to value all properties without regard to size. Any properties which have been omitted will be re-valued in the near future and proposals made if necessary." In December, 1942, the acting county valuation officer on behalf of the second respondent was actively continuing a systematic inspection and re-valuation of all the hereditaments in the said rating area with a view to the making

of further proposals so as to raise the general level of the existing assessments in the said rating area. The special case then sets out the contentions of the parties, that of the appellant being in effect the contention which had already appeared in the notice of appeal to quarter sessions and that of the respondents being in effect that the second respondent had no power or duty to prepare a new valuation list and were not in fact doing so but were acting in exercise of their statutory duty under s. 18 of the Act of 1925 to take such steps as they thought fit for promoting uniformity in the principles and practice of valuation and of their statutory powers under s. 37 of the same Act to make proposals for the amendment of the valuation list.

The contention of the appellant found favour with the Divisional Court, consisting of Lewis, Oliver and Birkett JJ. whose unanimous judgment was delivered by Birkett J. It was their opinion that the true view of the matters in controversy was that because a new valuation list, due in 1939 in the ordinary course of events, could not be brought into being and such a list was thought to be most desirable, the methods employed were designed to bring about the same end; that what could only be done under s. 19 of the Act of 1925 was sought to be done under s. 37 of that Act; that that was not a proper method of dealing with the position and had no sanction in law and that, accordingly, the proposal against which the appellant appealed was not a valid and legal proposal. The Court of Appeal were unanimous in reversing this decision, holding that what was done by the respondents was authorized by the plain language of s. 37 of the Act of 1925 and that the present appellant's argument involved a re-writing of that section for which there was no justification.

My Lords, in my opinion, the view of the Court of Appeal is to be preferred. Lord Greene M.R. has dealt exhaustively and, as I think, conclusively, with the construction of the Act of 1925, but your Lordships were pressed by counsel for the appellant with a decision of this House in *Camberwell Assessment Committee v. Ellis* (1), with which the Master of the Rolls did not explicitly deal. That was a case which was decided on another Act of Parliament, the Valuation (Metropolis) Act, 1869, ss. 46 and 47 of which contain provisions bearing some resemblance to those of s. 37 of the Act of 1925. On those sections it was determined by this House that to justify an alteration of the quinquennial valuation of a hereditament in

(1) [1900] A. C. 510.

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the metropolis (which was made under that Act) by a supplemental or provisional valuation it must be shown that the cause of the alteration in its annual value was one directly affecting that particular hereditament and that it was not enough merely to show that since the last quinquennial valuation there had been throughout the metropolis a general rise in the annual value of the class of property to which the particular hereditament belonged. My Lords, that is a binding authority on the meaning of those sections, but, if I may say so with the greatest respect to the learned judges of the King's Bench Division, I get little assistance from it in the construction of the relevant sections and in particular s. 37 of the Act of 1925. I do not doubt that that is why the learned Master of the Rolls did not deal with it.

The Act of 1925, which does not extend to the administrative county of London, appears to me to be unambiguous in its terms so far as relates to the present question. It is a comprehensive Act, as its title indicates, "An Act to simplify" and amend the law with respect to the making and collection "of rates by the consolidation of rates and otherwise, to" promote uniformity in the valuation of property for the "purpose of rates, to amend the law with respect to the" valuation of machinery and certain other classes of properties "and for other purposes incidental to or connected with the" matters aforesaid." In the construction of an Act with such an avowed purpose the judicial interpretation of similar, but in some respects, markedly different, language in an analogous statute can have relatively little weight with your Lordships. I examine very briefly the Act of 1925. Part I of the Act establishes the rating authorities in every rating area and provides for the making and levying of rates and for the issue of precepts. About this part of the Act I need say no more. Part II of the Act deals with "Valuation." First it establishes "assessment areas" and an "assessment committee" for each area. Then by s. 18 it provides for the establishment in every county of a committee of the county council to be called "the" county valuation committee," whose duty it is to take such steps as they think fit (inter alia) "for promoting uniformity" in the principles and practice of valuation" and whose right it is either alone or in conjunction with any rating authority, assessment committee or other county valuation committee to appear as a party to any objection or appeal under that part of the Act. Section 19, to which I have referred at an earlier

stage of this opinion, provides for the making of valuation lists, and for their duration. Section 25 and the following sections contain elaborate provisions for the preparation of such lists. I think it necessary only to note that under s. 26, sub-s. 1, "Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list, or by the insertion therein or omission therefrom of any matter . . . or otherwise with respect to the list, may . . . lodge an objection" in the manner prescribed. Section 27 provides for consideration of objections by the assessment committee and for their revision of the draft list, s. 28 for its final approval, and s. 31 and the following sections for appeals to quarter sessions. The list having now been settled and being in force for the statutory period, next comes the section which is all-important to this case. Section 37, sub-s. 1, provides that "Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force or by the inclusion therein or omission therefrom of any matter . . . or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list . . ." The question is whether the "proposal" made by the second respondent in this case was such a proposal as the section authorized. Two things are immediately apparent; first, that the language of the section could not be wider, and, second, that it is an exact repetition of s. 26. It is clear beyond all controversy that whatever might be a matter of "objection" under the earlier section may be a matter of "proposal" under the later one. If this is so, it could only be a compelling context which would justify some limitation being imposed upon the natural meaning of the words in question. I can find no such context. Whether the proposal stands alone or is one of many, whether the factors, which affect the value of a particular hereditament, affect the value of other hereditaments in a greater or less degree or not at all, appear to me to be considerations wholly irrelevant to the issue. The only question is whether the proposal falls within the plain meaning of s. 37. I agree with the Master of the Rolls that it is only by re-writing the section that it could be excluded. Nor, as I think, is there any force in the argument that, if "proposals" are on a sufficiently large scale, the result may be substantially the same as would follow from a new

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valuation list and that such a result is intended to be effected only by the procedure under s. 19 of the Act of 1925. It may well be that the legislature did not contemplate wholesale proposals just as it did not contemplate the postponement of quinquennial valuations. But I agree with the Court of Appeal that it is impossible to find anything in the Act which renders such proposals illegal.

My Lords, I have already indicated that, in my opinion, the *Camberwell* case (1), which was decided under the Act of 1869, does not assist your Lordships in the construction of the Act of 1925 and I do not think it necessary or useful to examine the manifold differences between the two Acts. But I should perhaps refer to *Rex v. Horsham and Worthing Assessment Committee* (2). That was a case decided under the Act of 1925, in which a county valuation committee notified a borough rating authority in the county that in the opinion of the committee the quinquennial valuation list for the borough, which had recently come into force, was not in accordance with the Act of 1925 in the matter of gross values. After due consideration the rating authority made many thousands of proposals for the amendment of the valuation list and a large number of objections fell to be decided by the assessment committee. It was sought to quash their decision overruling an objection to one such proposal upon a number of grounds, including (a) that no such proposal for the amendment of a valuation list could lawfully be made under s. 37 of the Act of 1925 and, (b) that s. 37 did not empower the rating authority to make a general re-valuation of their district to take effect during the currency of a quinquennial valuation list. These are in effect the grounds upon which the appeal now before the House is supported. The Divisional Court upheld the decision of the assessment committee and in the course of his judgment Lord Hewart C.J. distinguished the *Camberwell* case (1), emphasizing that the court was dealing with a different statute and different circumstances. In the same case, Singleton J., observing on the duties imposed upon the county valuation committee, said (3) that, if it became necessary for them to lodge proposals in order to promote uniformity, they would clearly be within their rights whether it was one proposal or many thousands of proposals. So far I entirely agree with this decision. But I observe that in a later passage Singleton J. said (4) that "if something was done which was in fact the

(1) [1900] A. C. 510.

(2) [1937] 2 K. B. 408.

(3) Ibid. 423.

(4) Ibid. 424.

" making of a new list, it might well be said to be contrary to " the spirit of the Act, and in particular to s. 19." I have some doubt what is intended by this observation, but I cannot assent to it, if it means that any limitation is to be imposed upon the power of the county valuation committee to make as many proposals as it thinks desirable. On the contrary, I think that, so long as any particular proposal is (to use the words of Tucker L.J. (1)) " within the four corners of s. 37," it is a lawful proposal which may lawfully be entertained, although similar proposals may be so numerous that few entries on the current valuation list will remain unaltered. The contrary view is I think expressed by Stable J. in *Murphy Radio, Ltd. v. Welwyn Garden City Rating Authority* (2), and I agree with the Master of the Rolls (3) that the passage which he cites from the judgment of that learned judge cannot be supported. Since the passages that I have quoted from the last two cases cited appear to reflect and to be founded on certain observations made in this House in the *Camberwell* case (4), I would conclude by repeating that that decision rested, as their Lordships in that case were careful to emphasize, on the statute and the attendant facts there under consideration, and cannot be taken as a guide in the construction of s. 37 of the Act of 1925. I would dismiss the appeal.

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LORD UTHWATT (read by LORD NORMAND). My Lords, the specific contentions of the appellant are two in number. His first contention is that it is not permissible for the county valuation committee, or, indeed, anyone else, to use the machinery provided by s. 37 of the Rating and Valuation Act, 1925, to produce in substance a new valuation list. His second contention is linked with the first contention and is that s. 37 cannot be invoked where those seeking to alter an existing assessment rely on a general change in values happening since the making of the current valuation list as distinct (to use the language of the appellant's printed case) from " a specific " change in or affecting or some addition to the hereditament " in question." The agreed case is not in all respects clear, and it may be doubted whether the facts there stated permit the raising of the second contention in the precise form in which it was put, but the respondents were content that any obscurities in the case should be resolved in favour of the appellant and

(1) [1946] K. B. 93, 109.

(3) [1946] K. B. 93, 105.

(2) (1943) 168 L. T. 427, 428.

(4) [1900] A. C. 510.

H. L. (E.) took the stand that s. 37 could be used whenever the value attributed to a hereditament in the valuation list was incorrect, the multitude of cases and the cause of error being in their submission immaterial.

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The contentions of the appellant obviously find their origin in the decision of this House in *Camberwell Assessment Committee v. Ellis* (1). The matter there in issue was the proper function of a supplemental list made under s. 46 of the Valuation (Metropolis) Act, 1869. The decision relates only to the proper construction of that section read in light of the Act as a whole. The observations made in that case as to the respective areas of the quinquennial valuation lists, supplemental lists, and provisional lists referred to in that Act are based only upon the construction of the Act and particularly upon the reference to "cause" contained in s. 47. In the Act of 1925 there is no reference to "cause" and in my opinion nothing in *Camberwell Assessment Committee v. Ellis* (1) affords any guide to the proper construction of the Act here under consideration.

Section 37 of the Act of 1925 is perfectly general in its terms. Verbally it contains nothing upon which the appellant can rest his contentions and nothing which negatives the broad proposition submitted by the respondents. A consideration of the Act as a whole may, however, compel the conclusion that, as a matter of construction, a gloss should be put upon the section having the effect of limiting its apparently universal application, or it may compel the conclusion that resort to the machinery of the section is an abuse and not a legitimate use, if incorrectness in the subsisting valuations is widespread or is due to some general cause. The relevant portions of the Act must therefore be examined.

The scheme of the Act is that a new valuation list must be made for every rating area at five-yearly intervals and each such valuation list (subject to the provisions of the Act including the provisions relating to alterations and additions) is to remain in force until superseded by a new valuation list (s. 19). Section 37 is directed to the making of amendments to the current valuation list. Where pursuant to the section a new value is attributed to a hereditament, the matter is carried through by an alteration of or addition to the valuation list (see s. 37, sub-s. 9). The additions and alterations so made are not pendants to the valuation list but part of it. Amendments as to value however numerous do not result in a

new valuation list, but only to new values in the current list. It is to the valuation list so added to or altered that statutory force is given.

The procedure to be followed on the making of a new valuation list is set out in ss. 25 et seq. For present purposes it is sufficient to point out that the classes of persons who may make proposals under s. 37 for the amendment of the valuation list are the same as the classes of persons who, on the making of a new valuation list, may, under s. 26, make objections to the draft valuation list, and that the matters falling for consideration on a proposal under s. 37 are described in the same language as the matters falling for consideration on an objection under s. 26. Textually (subject to one necessary alteration) the relevant language of s. 26 is repeated in s. 37. It is clear that all matters relating to value are open under s. 26, and a limited construction can, therefore, be attributed to s. 37 only on the ground that an amendment of an existing entry, and not the making of an original entry, is under consideration. The value attributed to any hereditament in the valuation list as for the time being in force is conclusive evidence of the value for every rate (s. 20). Rate is defined by s. 68 to include general rates, special rates and sums raised by precepts. All rating areas in the county are, therefore, interested in the value attributed to any particular hereditament in any rating area and disparity between the standards of values for the time being in force in different areas is of serious moment.

Section 18 contains a matter of particular importance for the purpose in hand. Provision is there made for the setting up of county valuation committees which are to include representatives of each assessment area in the county. The functions of these committees are set out in sub-s. 2. It is to be their duty to take such steps as they think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under Part II. of the Act. A committee as such is not pecuniarily interested in the proceeds of any rate but is included both in s. 37 (which relates to the revision of the valuation list), and in s. 23 (which relates to the draft valuation list) among the persons who may be aggrieved by any matter in the draft list or the valuation list. There is thus afforded to a committee, as well during the life of the valuation list as at its birth, the opportunity of carrying out its

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That so far as is here relevant is the general scheme of the Act. I can see nothing in it upon which to found a conclusion that, as a matter of construction, a limitation should be put upon the general language of s. 37 or that resort to machinery provided by that section would be an abuse if all the hereditaments in a particular rating area were involved and the cause of incorrectness perfectly general.

On the question of construction the identity of the language used in s. 37 with that used in s. 26 precludes any such limitation as that contended for by the appellant. A proposal for an amendment of a specific entry is not altered in character by reason that it forms part of a series of cases calling for alterations in value due to an identical or general cause, and, however numerous the amendments, the valuation list retains its character as the current valuation list. Upon the other point nothing turns on the circumstance that in this case it is the county valuation committee that has made the proposal under review, but the circumstance that under the section the county valuation committee is given the right to make proposals for the amendment of the list to my mind concludes this part of the case against the appellant. Acceptance of the appellant's contention involves the conclusion that the committee is restricted during the quinquennium to confining its attention to matters of minor import. Surely the contrary is the case. The obvious inference is that its right to make proposals was intended to march with the due performance of its statutory duty. The more general the inaccuracy of the subsisting valuations in a particular rating area—whether it be due to original incorrectness in the valuation list or to causes operating since its making—and the more general the cause, the more appropriate indeed would appear to be intervention by the committee. I cannot, therefore, see that the Act in its general intendment precludes resort being made to s. 37 where incorrectness is widespread and the cause of the incorrectness is general. Alterations on a wholesale scale may not have been in direct contemplation as a normal operation of the section but it is impossible to say that such alterations are foreign to the purpose it serves. I would dismiss the appeal.

LORD NORMAND. My Lords, I find myself in complete

agreement with the opinion which has been delivered by my noble and learned friend, Lord Simonds, to which I can add nothing.

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Appeal dismissed.

Solicitors for appellant: *Metcalfe, Copeman & Pettefar.*

Solicitors for respondents: *Vizard, Oldham, Crowder & Cash,*
for Mills & Reeve, Norwich.

END OF VOL. AND OF APPELLATE SERIES FOR 1947.

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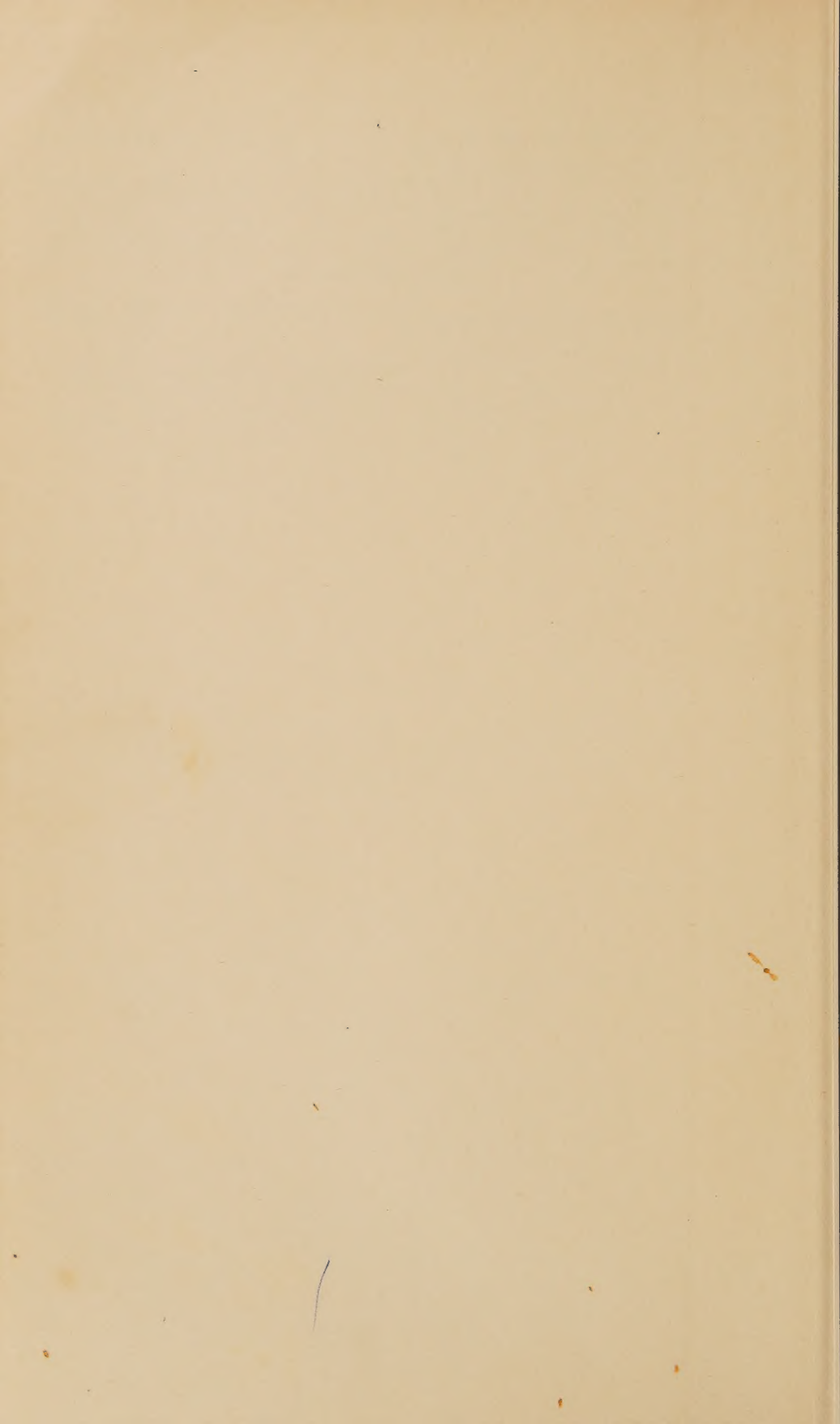
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